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Supreme Court, U.S.
FILED

No. 05- 051443 MAY 10 2006

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MOTION SYSTEMS CORPORATION,

Petitioner,

v.

GEORGE W. BUSH, President of the United States, ROBERT B. ZOELLICK, United States Trade Representative, and CCL INDUSTRIAL MOTOR, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Judicial review of executive decision-making, to assure that it conforms to the standards imposed by Congressional grants of the authority to act, comprises a fundamental tenet of American law. Every decision of the Federal Government – including executive decisions – must be authorized either by a statute enacted pursuant to the Constitution or by the Constitution itself and must be executed in conformity therewith. The Federal judiciary has the responsibility to determine whether executive decisions comport with the authorizing statute.

Recent events have witnessed a growing number of occasions in which the executive branch asserts that it possesses sole and unreviewable discretion to act or not act. This case concerns whether an executive decision, taken pursuant to a statutory delegation of authority made by a statute that sets standards by which the Executive must abide, becomes unreviewable because the executive decision is made by the President instead of a subordinate agent.

This issue arises in the context of federal trade legislation, a subject area reviewable only through appeal to the Court of Appeals for the Federal Circuit. Traditionally, courts hold executive decisions, including those on trade matters, to be subject to judicial review so as to determine whether the decision comports with the standards that Congress specified in the trade legislation. Here, the President rejected the determination of the United States International Trade Commission ("ITC") made in favor of petitioner. Because the President is not an "agency" within the meaning of the Administrative Procedure Act, review of Presidential compliance with statutory standards that govern delegated

authority takes place through nonstatutory judicial review. Breaking with its own precedent and comparable decisions of other Courts of Appeal, the Court of Appeals for the Federal Circuit, in a rare *en banc* decision, held *sua sponte* that the judiciary lacks power to review whether or not the executive branch made its decision within statutory standards when exercising authority granted to the President under section 421 of the Trade Act of 1974 ("section 421"), *codified at* 19 U.S.C. § 2451, when the President rejected the ITC's recommendation.

The questions presented for review are:

Whether the provision to the President of *limited* discretionary authority, as part of a statutory delegation of power, forecloses all judicial review of the President's actions even though such review would have existed had the action been delegated by Congress to an agency under the same statutory standards?

Does *Dalton v. Specter*, 511 U.S. 462 (1994), preclude judicial review of Executive decision-making even though the authorizing statute establishes standards that govern the making of the decision sought to be reviewed?

CORPORATE DISCLOSURE STATEMENT

Petitioner Motion Systems Corporation certifies that petitioner has no parent corporation and that no publicly held corporation owns 10% or more of the stock of it.

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Appendix A — Decision Of The United States Court Of Appeals For The Federal Circuit, Dated February 10, 2006 ..... 1a

Appendix B — Opinion Of The United States Court Of International Trade, Dated June 3, 2004 ..... 45a

OPINIONS BELOW

The case arises through a ruling on a motion for summary judgment. The opinion of the Court of International Trade (per Stanceu, J.) reviewing respondents' action and finding that it met the statutory requirements (Appendix B) is reported at 342 F. Supp. 2d 1247 (Ct. Int'l Trade 2004). The Federal Circuit's opinion (*en banc*) affirming the judgment on other grounds, those being that the decision of the President is unreviewable, (Appendix A) is reported at 437 F.3d 1356 (Fed. Cir. 2006).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its judgment on February 10, 2006. This petition is filed within ninety days of that date. No rehearing was requested. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254.

STATUTE INVOLVED

The pertinent section of the Trade Act of 1974, as amended, 19 U.S.C. § 2451, states as follows:

> (a) Presidential action. If a product of the People's Republic of China is being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of a like or directly competitive product, the President shall, in accordance with the provisions of this section, proclaim increased duties or other import restrictions with respect to such product, to the

extent and for such period as the President considers necessary to prevent or remedy the market disruption.

(k) Standard for presidential action.

(1) Within 15 days after receipt of a recommendation from the Trade Representative under subsection (h) on the appropriate action, if any, to take to prevent or remedy the market disruption, the President shall provide import relief for such industry pursuant to subsection (a), unless the President determines that provision of such relief is not in the national economic interest of the United States or, in extraordinary cases, that the taking of action pursuant to subsection (a) would cause serious harm to the national security of the United States.

(2) The President may determine under paragraph (1) that providing import relief is not in the national economic interest of the United States only if the President finds that the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action.

19 U.S.C. §§ 2451(a) & (k).

STATEMENT OF THE CASE

Section 421 mandates that the President provide import relief in the form of "increased duties or other import restrictions" for domestic industries threatened by "market disruption" caused by increased importation of products from China. Import relief may only be denied when the President appropriately finds that such action would have an adverse impact on the United States economy clearly greater than the benefits of such action or, in extraordinary cases, that the taking of such action would cause serious harm to the national security of the United States. 19 U.S.C. §§ 2451(a) & (k).

Section 421(k)(2) carefully limits the President's authority to that of a fact finder of economic facts, requires that he make certain findings of fact and affords him no discretion in this regard or to make a decision on any other grounds. The limited authority allowed to the President, who may only act as a fact finder who culls the relevant economic facts necessary to make a lawful determination, is not a grant of unfettered discretion.

Petitioner Motion Systems Corporation ("Motion Systems") is a U.S. producer of pedestal actuators, electromechanical devices that adjust the seat heights of mobility scooters and motorized wheelchairs. In 2002, Motion Systems filed a petition with the ITC seeking relief from the increased imports of pedestal actuators from China. The ITC conducted an investigation and determined that Chinese pedestal actuators were being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to American producers of pedestal actuators. So as to remedy

actual or potential market disruption, the ITC recommended that the President impose a quantitative restriction on imports of pedestal actuators from China for a three year period, and suggested a specific quota for each of the three years.

The United States Trade Representative ("Trade Representative") solicited written comments and conducted a public hearing on the matter, and then submitted to the President its recommendation regarding the ITC's determination. On January 17, 2003, the President denied the import relief recommended by the ITC and sought by the petitioner. The President's decision recited in conclusory fashion the presence of the only circumstance in which section 421(k)(2) allowed him not to act — i.e., that "providing the requested import relief for the U.S. pedestal actuator industry is not in the national economic interest of the United States" because "the import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action," but the conclusion was not supported by the necessary factual findings.

On April 9, 2003, petitioner filed suit against the President and the Trade Representative in the Court of International Trade. Petitioner challenged the President's denial of import relief because section 421(k)(2) explicitly forbade the President to act so as to deny relief as recommended by the ITC unless he made economic findings of fact that found that the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action. The record provided no economic basis for the finding of an adverse impact on the United States economy clearly greater than the benefits of such action, the President's decision was merely conclusory and neither court below examined the record to determine whether it supported the President's decision.

In the Court of International Trade, all three respondents, the President, the Trade Representative and CCL Industrial Motor Ltd., acknowledged that the President's determination was subject to judicial review and invoked the standard articulated by the Federal Circuit in *Maple Leaf Fish Co. v. United States*,[1] even though the authorizing statute allows for limited discretion in decision-making. Petitioner proposed that, although the President's decision should not withstand *Maple Leaf* review, section 421 entailed an even stricter standard of review because section 421 granted him far less discretion than is provided by the statute at issue in *Maple Leaf*. The Court of International Trade decided to examine the President's actions under the *Maple Leaf* standard of review, which called for the court to determine whether the President had (i) misconstrued section 421, (ii) exceeded his statutory authority thereunder or (iii) violated the statute's procedural requirements. The trial court decided not to review whether the record supported the decision to deny the relief recommended by the ITC and ruled that the President's action met the requirements of *Maple Leaf*.

On appeal, the Court of Appeals for the Federal Circuit declined to review the case. It held instead, *sua sponte*, that judicial review could not be had of Presidential action under section 421, based upon *Dalton v. Specter*, 511 U.S. 462 (1994), even though none of the respondents had argued that *Dalton* rendered the President's determination immune from review.

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1. 762 F.2d 86, 89 (Fed. Cir. 1985) (holding that "[f]or a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.")

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTING INTERPRETATIONS OF *DALTON v. SPECTER* REGARDING THE AVAILABILITY OF NONSTATUTORY JUDICIAL REVIEW OF EXECUTIVE ACTION

The Federal Circuit's decision conflicts with multiple decisions of the Court of Appeals for the District of Columbia Circuit regarding the reviewability of Presidential action where, as here, the delegating statute sets standards limiting the discretionary authority of the President. In *Dalton*, this Court held that Presidential actions pursuant to a legislative grant of authority are not subject to judicial review where the authorizing statute "does not at all limit the President's discretion. . . ." 511 U.S. at 476. In foreclosing judicial review, the Court noted that nothing in the statute in question, the Defense Base Closure and Realignment Act of 1990 (the "1990 Act"), "prevents the President from approving or disapproving the [base closure] recommendations for *whatever reason he sees fit*." *Id.* (emphasis added).

Significantly, *Dalton* did not decide the broader question of whether nonstatutory judicial review exists of Presidential decision-making made under authority delegated by statute irrespective of the degree of discretion afforded the President. The Court assumed "for the sake of argument" that such review was available but would nonetheless be precluded because the President had *unfettered discretion* under the 1990 Act. *Id.* at 474 (1994). Thus the narrow holding of *Dalton* is that judicial review relief is withheld "where

Congress has permissibly foreclosed it. . . ." *Id.* at 477. Justice Blackmun's concurring opinion underscored the "limited reach" of this Court's holding in *Dalton*. *See id.* His opinion stated that "neither a challenge to ultra vires exercise of the President's statutory authority nor a timely procedural challenge is precluded . . ." from judicial review. *Id.* at 478 (Blackmun, J., concurring in part and concurring in the judgment). The *Dalton* decision clearly did not address the availability or degree of judicial review where an authorizing statute, such as section 421, greatly constrains the President's discretionary authority.

The Federal Circuit's opinion construed *Dalton* expansively, not narrowly. Section 421, unlike the 1990 Act, imposes substantial restrictions on the President's discretion, yet the Federal Circuit nonetheless held that the President's determination was "sufficiently discretionary to preclude judicial review." *Motion Systems Corp. v. Bush*, 437 F.3d 1356, 1362 (Fed. Cir. 2006). In so doing, the Federal Circuit erroneously found that section 421 "accords the President the same discretion found to remove Presidential action from judicial review in other Supreme Court cases." *Id.* at 1360. The Federal Circuit cited *United States v. Bush*, 310 U.S. 371 (1940), and *Dakota Central Telephone Co. v. State of South Dakota*, 250 U.S. 163 (1919), for the proposition that the President acts in his unreviewable discretion, even where such discretion is limited by statute. *Id.* at 1360-61.

In sharp contrast to the Federal Circuit's expansive interpretation of *Dalton*, the D.C. Circuit has recognized that "*Dalton's* holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and *contains no limitations* on the President's exercise of that authority, judicial review of an abuse of discretion claim

is not available." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996) (emphasis added). Unlike the Federal Circuit, the D.C. Circuit found that *Dalton's* citations to *United States v. Bush* and *Dakota Central* actually demonstrated the limited holding of *Dalton*, as in both of those cases "special reasons existed for concluding that judicial review was precluded." *Id.* at 1332 n.5. The D.C. Circuit noted, in particular, that the Presidential order in *Dakota Central* involved considerations of national security outside the province of the judiciary, and that the basis for the President's determination in *Bush* was unreviewable because the President adhered to the procedures prescribed by Congress. *Id.*

The D.C. Circuit reiterated, in *Mountain States Legal Found. v. Bush*, that *Dalton* is inapposite "where the authorizing statute . . . places discernible limits on the President's discretion." 306 F.3d 1132, 1136 (D.C. Cir. 2002). In such cases, judicial review does not implicate the same separation of powers concerns and "[c]ourts remain obligated to determine whether statutory restrictions have been violated." *Id.* Accordingly, judicial review is available to ensure that Presidential actions "are consistent with constitutional principles and that the President has not exceeded his statutory authority." *Id. See also National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974) (holding that "the judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch.")

Because Presidential decisions on trade-related matters can be judicially reviewed only under the aegis of the Federal Circuit, if the issue is not reviewed now, it will become

unreviewable in future customs and trade cases. This petition for certiorari should be granted in order to resolve the foregoing split between the D.C. Circuit and the Federal Circuit and to answer the fundamental question of whether executive decision-making ceases to be reviewable when it includes an element of discretion to be exercised by the President.

II.

THE FEDERAL CIRCUIT'S DECISION RAISES THE IMPORTANT QUESTION OF WHETHER *DALTON* REPUDIATED ALL JUDICIAL REVIEW OF ALLEGEDLY ULTRA VIRES PRESIDENTIAL ACTION

As noted above, *Dalton* declined to decide whether judicial review of allegedly ultra vires Presidential action exists when the statute in question does not provide for such review. The Court in *Dalton* stated only that "[w]e may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA." 511 U.S. at 474.[2] At least one Court of Appeals has interpreted this statement as casting doubt on the availability of nonstatutory review of Presidential action. *See Reich*, 74 F.3d at 1331 n.4. *Dalton* cast further doubt on the possibility of judicial review by also holding that ultra vires Presidential actions may *not* be challenged on constitutional grounds. The Federal Circuit's recent expansion of *Dalton*, a product of the uncertain implications of that decision, has the troubling effect of eliminating judicial review of executive action pursuant to statutes.

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2. *See Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981) (reviewing whether executive orders issued by President were authorized by grant of authority under the Trading with the Enemy Act.)

A. The Federal Circuit's Interpretation of Dalton Eviscerates the Right to Bring a Statutory Claim Challenging Ultra Vires Executive Action

When the law gives the President unfettered discretion to act or not on a political basis, his decisions become unreviewable, but it has always been the law that "*where a specific duty is assigned by law*, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury v. Madison*, 5 U.S. 137, 166 (1803) (emphasis added). The proposition that executive action will be judicially reviewed except where the decision has been relegated to the purely political realm thus dates to the infancy of American jurisprudence.

The presumption in favor of judicial review of executive action grew stronger with Justice Marshall's opinion in *United States v. Nourse*:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process, and levy on the person, lands, and chattels of the debtor, any sum he might believe to be due, leaving to that debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

34 U.S. 8, 28-29 (1835).

The principle of nonstatutory judicial review of executive action emerged more fully over time. For example, in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 95 (1902), the plaintiff sought an injunction preventing a Post Office official from executing a certain order of the Postmaster General. The Court granted plaintiff injunctive relief and explained that:

> [t]he acts of all [a department's] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief . . . Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual.

Id. at 108, 110.

In *Harmon v. Brucker*, this Court, relying on *McAnnulty*, held that acts in excess of express or implied statutory powers are not discretionary, and therefore are not shielded from judicial scrutiny. 355 U.S. 579, 581-82 (1958). The Court stated that "[g]enerally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Id.* More recently, this Court affirmed that executive action under legislatively delegated authority "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review. . . ." *INS v. Chadha*, 462 U.S. 919, 954 n.16 (1983).

As stated by the Court in *Bowen v. Michigan Academy of Family Sciences*: "We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." 476 U.S. 667, 681 (1986). Furthermore, this Court has "stated time and time again that judicial review of executive action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) *quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Thus, "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Stark v. Wickard*, 321 U.S. 288, 309 (1944).

The plaintiffs in *Stark* sought injunctive relief against the Secretary of Agriculture for allegedly exceeding his statutory authority. *Id.* at 289. Although the statute in question did not provide for judicial review, the Court held that the "responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Id.* at 310. The Court reversed the dismissal of the petitioners' action, finding that they were entitled to judicial examination of their claims that certain provisions of the Secretary's order exceeded his statutory powers. *Id.* at 311.

The Federal Circuit ignored the historical availability of nonstatutory review of executive action when it refused to review the petitioner's claims against the President. The Federal Circuit's decision also constitutes an unwarranted

expansion of *Dalton*, such that judicial review is precluded despite the existence of a clear legal standard (the explicit limits on Presidential discretion in section 421) by which the court could review the President's exercise of discretion. Unlike the 1990 Act at issue in *Dalton*, section 421 is not an instance "where Congress has permissibly foreclosed" judicial review by affording unlimited discretion to the executive. *Dalton*, 511 U.S. at 477. The Federal Circuit's unrestrained interpretation of *Dalton* has produced a circuit split and, unfortunately, heightened the uncertainty first raised by *Dalton* regarding judicial limits on executive action.

The petitioner therefore asks that the Court clarify the availability of nonstatutory review of Presidential action, in the wake of *Dalton*, so that the effect of that decision, keenly felt by the petitioner, is not to remove all executive action from judicial review.

B. The Federal Circuit's Refusal to Review Petitioner's Claims Against the President Warrants Amplification of the Distinction, Relied Upon Here by the Federal Circuit, Between Ultra Vires and Unconstitutional Executive Action

Presidential power must stem either from authority delegated to him by Congress or from the Constitution itself. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Therefore, the judiciary must review the actions of the President to ensure that he does not act beyond his constitutional authority. *See id.* Further, in *Franklin v. Massachusetts*, this Court, citing *Youngstown*, reaffirmed that the President's actions may always be reviewed for constitutionality. 505 U.S. 788, 801 (1992) (finding that although they are not subject to review under the

Administrative Procedure Act, "the President's actions may still be reviewed for constitutionality.")

Dalton, however, created uncertainty because it suggested that a difference may exist between ultra vires and constitutional review. Citing *Dalton*, the Federal Circuit here rejected the notion that the petitioner could review the President's decision under section 421 as ultra vires. *Motion Systems*, 457 F.3d at 1359-60. The *Dalton* Court concluded that claims that an official exceeded his statutory authority are statutory in nature, and thus the "exception identified in *Franklin* for review of constitutional claims . . ." did not apply. *Dalton*, 511 U.S. at 474. In so holding, the Court noted that it has often "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Id.* at 472.

Dalton seemed to distinguish actions in excess of statutory authority from unconstitutional actions on the ground that its precedents made such a distinction. *Id.* Specifically, the Court pointed to *Larson v. Domestic & Foreign Commerce Corp.*, as an instance in which it had distinguished between ultra vires and unconstitutional acts. *Id.*[3] The *Dalton* Court reasoned that "[i]f all executive actions in excess of statutory authority were *ipso facto* unconstitutional, . . . there would be little need in *Larson* for our specifying unconstitutional and ultra vires conduct as separate categories." *Id.*

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3. In *Larson*, the Court found that "a suit may fail, as one against the sovereign, even if it claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers. . . ." 337 U.S. 682, 691 n.11 (1949).

By drawing a distinction between ultra vires and unconstitutional acts, the Court in *Dalton* was compelled to distinguish *Youngstown.*[4] *In contrast to the claim raised in Dalton*, the Court found that *Youngstown* "involved the conceded *absence* of *any* statutory authority, not a claim that the President acted in excess of such authority." *Id.* at 473. The Court thus concluded that *Youngstown* "cannot be read for the proposition that an action taken by the President in excess of his statutory authority necessarily violates the Constitution." *Id.*

This, however, is merely a formalistic distinction, and *Dalton* did not explicate the reasoning underlying its distinction between acts *in excess of* statutory authority and those performed in the *absence* of such authority. The confusion that resulted from the *Dalton* Court's reliance on *Larson* and the manner in which it distinguished *Youngstown* is that *Dalton* neither explains the constitutional predicate for making such a distinction nor addresses the implications of doing so. As a result, this dichotomy between ultra vires action (i.e., action not consonant with the authorizing statute) and unconstitutional action provides insufficient guidance to establish whether and under what circumstances nonstatutory review exists of executive decisions challenged as contrary to a statutory limitation on authority.

Upon closer examination, the Constitution's explicit limitations on federal power[5] and the principle of separation

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4. Petitioner submits that the Court felt it necessary to distinguish *Youngstown* because that decision militates in favor of the reviewability of the plaintiffs' claims in *Dalton.*

5. For example, U.S. Const., amend. X.

of powers render incorrect the notion that Presidential action outside the parameters set by statute cannot be reviewed unless it is also unconstitutional. When the President does not act within the parameters set by the authorizing statute, he acts unconstitutionally because he has no authority under the Constitution to act except to the limited extent as the statute authorizes him to act. Whether classified as ultra vires or as unconstitutional because the decision being reviewed failed to comport with the authorizing statute, a decision by the President acting pursuant to statutorily delegated authority by a statute containing standards should perforce be subject to judicial review.

In sum, the unclear distinction made between executive action that does not conform to statutory authority and unconstitutional action threatens the ability of the judiciary to assert any meaningful check on executive action pursuant to statutory authority. The Federal Circuit, however, invoked this distinction to reject the petitioner's constitutional claims. Accordingly, there is a significant constitutional aspect to the Federal Circuit's denial of judicial review here and certiorari should be granted so that the Court may address it. In particular, certiorari should be granted so that the Court may articulate the distinction, if any, between nonstatutory review of unconstitutional and ultra vires executive action.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, DATED FEBRUARY 10, 2006

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

04-1428

MOTIONS SYSTEMS CORPORATION,

Plaintiff-Appellant,

v.

GEORGE W. BUSH, President of the United States, and ROBERT B. ZOELLICK, United States Trade Representative,

Defendants-Appellees,

and

CCL INDUSTRIAL MOTOR LTD.,

Defendant-Appellee.

Decided: February 10, 2006

Before MICHEL, *Chief Judge*, NEWMAN, MAYER, LOURIE, *Circuit Judges*, CLEVENGER, *Senior Circuit Judge*, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, and PROST, *Circuit Judges*.

Opinion for the court filed PER CURIAM. Opinion concurring in part and concurring in the judgment filed by *Circuit Judge* GAJARSA, in which *Circuit Judge* NEWMAN joins.

PER CURIAM.

Appendix A

Motion Systems Corp. ("Motion Systems") brought suit against George W. Bush, President of the United States, and Robert B. Zoellick, United States Trade Representative ("Trade Representative"), in the United States Court of International Trade, challenging the President's determination not to grant import relief to the domestic pedestal actuator industry under section 421 of the U.S.-China Relations Act of 2000, Pub.L. No. 106-286, 114 Stat. 880 (codified at 19 U.S.C. § 2451) ("section 421"). The Court of International Trade granted judgment in favor of the defendants. *Motion Systems Corp. v. Bush,* 342 F.Supp.2d 1247 (Ct. Int'l Trade 2004). Motion Systems appealed and for the reasons set forth below, we affirm.

I

Section 421, added to the Trade Act of 1974 by the U.S.-China Relations Act of 2000, establishes procedures under which the President may provide import relief in the form of "increased duties or other such import restrictions" for domestic industries threatened by "market disruption" caused by increased importation of products from China 19 U.S.C. § 2451(a) (2000).

In accordance with section 421(b)(1), Motion Systems filed a petition with the United States International Trade Commission ("ITC"), alleging that importation of Chinese pedestal actuators had increased rapidly from 2000-2002, resulting in market disruption within the meaning of section 421. At the time, Motions Systems was one of three domestic producers of pedestal actuators, electromechanical devices used principally to raise and lower the seats of mobility

scooters and motorized wheelchairs. *See Pedestal Actuators from China: Investigation No. TA-421-1,* Pub. 3557 (U.S. Int'l Trade Comm'n, Nov. 2002), at 3, 11-16.

Upon receipt of the petition, the ITC promptly investigated "whether products of the People's Republic of China are being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products." 19 U.S.C. § 2451(b)(1). On October 18, 2002, the ITC issued an affirmative finding of market disruption and transmitted its report and remedial recommendations to the President and the Trade Representative. *See* 19 U.S.C. § 2451(f)-(g). The ITC recommended that "the President impose a quantitative restriction for a three-year period on imports of the subject pedestal actuators from China," and suggested specific amounts for each year. In accordance with section 421(h)(1), a summary of the ITC's determination and an invitation for public comment was published in the Federal Register. *See Notice of Proposed Measure and Opportunity for Public Comment Pursuant to Section 421 of the Trade Act of 1974: Pedestal Actuators from the People's Republic of China,* 67 Fed.Reg. 71007-03 (Nov. 27, 2002).

On January 2, 2003, after attempts to negotiate a remedial agreement with China proved unsuccessful, the Trade Representative submitted to the President his recommendations regarding the ITC's determination. However, the President did not provide the requested import relief. Rather, the President concluded that "providing import relief for the U.S. pedestal actuator industry is not in the

national economic interest of the United States" because "the import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action." *Presidential Determination on Pedestal Actuator Imports from the People's Republic of China,* 68 Fed.Reg. 3157 (Jan. 17, 2003). The President found that the ITC's recommended import quota would not likely benefit the domestic pedestal actuator industry, but instead would cause imports to shift to other offshore sources. Moreover, the President found that even if the import quota would provide some benefit to domestic producers of pedestal actuators, this benefit would be substantially outweighed by the increased cost to the downstream purchasers and the ultimate consumers of pedestal actuators. Motion Systems requested reconsideration of the President's determination, which the President denied.

On April 9, 2003, Motion Systems filed suit against the President and the Trade Representative in the Court of International Trade, challenging the President's denial of import relief and seeking declaratory and injunctive relief. The complaint alleged that the President's denial of relief was beyond his statutory authority under section 421, arguing that the President misconstrued the provisions of section 421 specifying the circumstances in which he may deny import relief and that the relevant facts did not support the conclusion that the import relief would have an adverse impact clearly greater than its benefits. The complaint also alleged that the Trade Representative's actions were in error, arguing that he too misconstrued section 421 and that he did not follow proper procedures in conducting the public hearing on the ITC's findings.

Appendix A

The Court of International Trade granted judgment in favor of the defendants, concluding that the President did not exceed his statutory authority and that the President's action was not invalid because of any defect in the procedures followed by the Trade Representative. *Motion Systems,* 342 F.Supp.2d at 1262, 1265.

II

Section 421 defines the role of the President and the Trade Representative in determining whether to provide import relief for market disruption due to importation of products from China. An ITC investigation into market disruption may be initiated upon the request of the President or the Trade Representative, upon resolution of the House Committee on Ways and Means or the Senate Finance Committee, upon petition by a private entity "which is representative of an industry" in accordance with 19 U.S.C. § 2252(a), or by the ITC's own motion. 19 U.S.C. § 2451(b)(1). If, after an investigation, the ITC makes an affirmative determination of market disruption, it must propose import relief in the form of an "increase in, or imposition of, any duty or other import restrictions necessary to prevent or remedy the market disruption." 19 U.S.C. § 2451(f). The ITC must submit to the President and the Trade Representative a report containing its determination and recommendations, along with an explanation thereof, and must make that report available to the public. 19 U.S.C. § 2451(g).

After receiving this report, and following a period of public notice and comment, the Trade Representative must make a recommendation to the President concerning what action, if any, to take. 19 U.S.C. § 2451(h). However, the President has discretion to determine whether import relief should be awarded. Under section 421(k)(1), the President must, within fifteen days of receiving the Trade Representative's final recommendation, "provide import relief . . . unless the President determines that provision of such relief is not in the national economic interest of the United States . . . ." 19 U.S.C. § 2451(k)(1). Further, the statute provides that "[t]he President may determine . . . that providing import relief is not in the national economic interest of the United States only if the President finds that the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action." 19 U.S.C. § 2451(k)(2).

III

No right of judicial review exists to challenge the acts of either the President or the Trade Representative in this case. There is no explicit statutory cause of action granting a petitioner who is denied import relief under section 421 the right to sue the President and the Trade Representative in the Court of International Trade. Thus, Motion Systems has only two potential sources for relief: (1) the Administrative Procedure Act ("APA"), 5 U.S.C. § 701; or (2) some form of nonstatutory review. Motion Systems acknowledges that it cannot challenge the President's actions under the APA because the President is not an "agency." *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01, 112 S.Ct. 2767, 120

L.Ed.2d 636 (1992). Thus, Motion Systems must resort to some form of nonstatutory review as its only potential source for relief.

As regards Motion Systems' challenge to the President's actions, this case reduces down to a rather simple issue: Can Motion Systems challenge the President's discretionary actions under 19 U.S.C. § 2451 as outside the scope of authority delegated to him by Congress? *Dalton v. Specter,* 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994), rejected this alternative and thus leaves Motion Systems with no right to judicial review here. Hence, under *Dalton,* no complaint can lie against the President on the facts of this case.

In *Dalton,* the plaintiffs challenged the President's decision to close the Philadelphia Naval Shipyard as a violation of the Defense Base Closure and Realignment Act of 1990. 511 U.S. at 464, 114 S.Ct. 1719. In Part I, the Court held that a straightforward application of *Franklin* removes the APA as a statutory alternative for standing because the President is not an "agency." *Id.* at 468-70, 114 S.Ct. 1719. In Part II, the Court took up the alternative ground relied on by the United States Court of Appeals for the Third Circuit: "[T]hat whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Id.* at 471, 114 S.Ct. 1719. In other words, the Third Circuit had held that if the President's actions are outside the scope of authority delegated to him by the 1990 Act, they can be challenged under a nonstatutory "constitutional" cause of action analogous to Motion Systems' claim in the present case. In *Dalton,* however, the Court rejected this theory as inconsistent with its precedents.

The Court commented that its precedents "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Id.* at 472, 114 S.Ct. 1719. The Court pointed to *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), as an example of a case properly characterized as involving a "constitutional" challenge. *Id.* at 473, 114 S.Ct. 1719. In that case, the Government disclaimed any statutory authority for the President's seizure of steel mills and invoked the Constitution itself as authority for the Presidential action. *Id.* ("Because no statutory authority was claimed, the case necessarily turned on whether the Constitution authorized the President's actions."). The Court then explained that, in contrast to *Youngstown, Dalton* involved a statutory claim: "The President is said to have violated the terms of the 1990 Act by accepting procedurally flawed recommendations." *Id.* at 474, 114 S.Ct. 1719. In other words, the President purportedly acted outside the scope of authority delegated to him by the 1990 Act. The Court did not address the extent of available review of Presidential action for violation of a "statutory mandate," assuming that some such review was available. *Id.* However, because the Court concluded that the challenged Presidential action was discretionary under the 1990 Act, *see id.* at 476, 114 S.Ct. 1719, the Court held that review was in any event precluded by the longstanding rule that: "[Judicial] review [of Presidential action] is not available when the statute in question commits the decision to the discretion of the President." *Id.* at 474, 114 S.Ct. 1719.

Here, there is no colorable claim that the President exceeded his statutory authority. Instead, this case presents nearly the same situation as in *Dalton:* Motion Systems alleges the President violated the terms of section 421 by opting to protect national interests over domestic industry without evidentiary support. Motion Systems thus accuses the President of acting beyond the scope of authority delegated to him under the statute. Motion Systems attempts to distinguish *Dalton* because, in its view, section 421 gives the President only purely ministerial duties. *See Mississippi v. Johnson,* 4 Wall. 475, 71 U.S. 475, 498, 18 L.Ed. 437 (1866) (leaving open the question of whether the President can be sued to perform a purely ministerial act under a positive law). To the contrary, section 421 unquestionably grants the President broad discretion to determine "that provision of [import] relief is not in the national economic interest of the United States or . . . that the taking of action . . . would cause serious harm to the national security of the United States." 19 U.S.C. § 2451(k)(1) (2004).

Section 421 thus accords the President the same discretion found to remove Presidential action from judicial review in other Supreme Court cases. In *United States v. George S. Bush & Co., Inc.,* 310 U.S. 371, 60 S.Ct. 944, 84 L.Ed. 1259 (1940), upon which *Dalton* expressly relies, 511 U.S. at 476, 114 S.Ct. 1719, the Court dealt with subject matter quite similar to that of this case. The statute at stake in *Bush* gave the President discretion to increase tariffs, and he had done so. An importer challenged the President's action. This court's predecessor, the Court of Customs and Patent Appeals, invalidated the increased tariff. Notably, the relevant statute in *Bush*

> provided . . . that the President "shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, *if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.*"

Bush, 310 U.S. at 376-77, 60 S.Ct. 944 (emphasis added). Like section 421, the statute in *Bush* limited to some degree the President's discretion. Specifically, the statute in *Bush* required the President to find that the rates of duty and changes are "necessary to equalize such differences in costs of production" before taking action. Despite this limit on the President's discretion, the Court held that the Presidential decision was not subject to judicial review:

> The President's method of solving the problem was open to scrutiny neither by the Court of Customs and Patent Appeals nor by us. Whatever may be the scope of appellate jurisdiction conferred by § 501 of the Tariff Act of 1930, *it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are necessary to equalize the differences in the domestic and foreign costs of production.*

Id. at 379, 60 S.Ct. 944 (emphasis added).

Appendix A

In *Dakota Central Telephone Co. v. State of South Dakota,* 250 U.S. 163, 181, 39 S.Ct. 507, 63 L.Ed. 910 (1919), another case upon which *Dalton* expressly relies, 511 U.S. at 476, 114 S.Ct. 1719, the Court dealt with the President's ability to seize control of various communication systems for national security or defense reasons. Notably, the relevant statute in *Dakota* provided:

> That the President during the continuance of the present war is authorized and empowered, *whenever he shall deem it necessary for the national security or defense,* to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war . . . .

Dakota, 250 U.S. at 181, 39 S.Ct. 507 (quoting 40 Stat. 904 (1918)) (emphasis added). As in *Bush*, the statute in *Dakota* also limited to some degree the President's discretion. Specifically, the statute required the President to determine that seizure was "necessary for the national security or defense." Despite this restriction, the Court again concluded the Presidential action at issue was "beyond the reach of judicial power." *Id.* at 184, 39 S.Ct. 507. The Court made this determination despite a challenge to the President's action as being unjustifiable at the time the power was exercised. *Id.* (commenting that the plaintiffs alleged that "there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and assails the

motives which it is asserted induced the exercise of the power"). Thus both *Dakota* and *Bush* involved situations where the Court insulated Presidential action from judicial review for abuse of discretion despite the presence of some statutory restrictions on the President's discretion. Similarly, section 421 places some restriction on the President's discretion to grant or deny import relief. But here, there is no colorable claim that the President has violated an explicit statutory mandate. Rather, the issue is whether the President abused his discretion under section 421(k). The President must determine "that provision of [import] relief is not in the national economic interest of the United States or . . . that the taking of action . . . would cause serious harm to the national security of the United States." 19 U.S.C. § 2451(k)(1). However, under *Dalton, Bush*, and *Dakota,* the President's actions under section 421 are still sufficiently discretionary to preclude judicial review.

Finally, because the acts of the Trade Representative were not final actions, the Court of International Trade also lacked jurisdiction to review those acts. Instead, the Trade Representative's actions were analogous to those of the Secretary in *Franklin,* a case in which the Secretary's report was "like a tentative recommendation" or "the ruling of a subordinate official" because it was the President who carried the responsibility of transmitting the final report to Congress. *Franklin,* 505 U.S. at 798, 112 S.Ct. 2767 (internal quotation omitted). A subordinate officer's actions become reviewable as final only when they carry a direct and immediate consequence. *See Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (concluding that the Secretary's certification to the President

automatically triggered sanctions and thus was a final action). In this case, the Trade Representative's actions were not final, but only recommendations for Presidential action, and are thus not reviewable.

IV

On the facts of this case, no complaint can lie against either the President or the Trade Representative. The President's actions cannot be challenged because judicial review is unavailable when a statute allegedly violated itself commits a decision to the discretion of the President. The Trade Representative's actions cannot be challenged because they were not final. We therefore affirm the judgment of the Court of International Trade in favor of both defendants.

AFFIRMED

GAJARSA, *Circuit Judge*, with whom *Circuit Judge* PAULINE NEWMAN joins, concurring in part and concurring in the judgment.

The court concludes that the decision not to assess antidumping duties against CCL Industrial Motor Ltd. will stand. I too would sustain that conclusion, but on its merits, not by default. On its merits, this action by the President is within the statutory authority and discretion that Congress assigned to the President; I conclude, therefore, that the action of the President is in accordance with law.

I write separately to express the view that the court is not barred from review of the range of statutory discretion assigned to the President by Congress. On conducting such review, as fully briefed and argued on this appeal, I conclude that the President's decision is within the parameters of the Act of Congress that assigned to the President the responsibility for the balancing of the economic impact of each instance of dumping.[1] It is not the judiciary's role to grade how the President conducts such an economic study, for the statute established only the broad parameter that the President must balance the economic effect on the aggrieved domestic industry against the economic benefit of the cheaper foreign import. However, it is the judiciary's role, and its

1. In accordance with 19 U.S.C. § 2451(k)(1), the President is charged to "provide import relief for such industry pursuant to subsection (a) of this section, unless the President determines that provision of such relief is not in the national economic interest of the United States or, in extraordinary cases, that the taking of action pursuant to subsection (a) of this section would cause serious harm to the national security of the United States."

duty, to review whether the President acted within the statutory parameters. The court's holding that the President's actions cannot be reviewed on any basis is contrary to the statutory assignment and contrary to the structure of our government.

I.

The majority correctly notes that because no right of judicial review is available under the APA, "Motion Systems must resort to some form of nonstatutory review as its only potential source of relief." It then interprets the Supreme Court's decision in *Dalton v. Specter* to have "rejected" the notion that a litigant could "challenge the President's actions . . . as outside the scope of authority delegated to him by Congress." But *Dalton* says no such thing, and the majority's interpretation of it represents an unwarranted expansion of the narrow holding of that case.

The general principle underlying the Supreme Court's opinion in *Dalton*-that discretionary Presidential actions without constitutional implications are not subject to judicial review is unexceptionable. No one has argued that the President's discretionary actions under § 2451 raise constitutional questions. The question dividing us is, rather, whether a statute delegating to the President *qualified* discretion is sufficient to render unreviewable whether the Presidential action is pursuant to the statute, and is within the assigned discretionary authority, such that the President must be dismissed as a defendant without further inquiry. *Dalton* does not mandate that result.

I note, first, that the majority opinion in *Dalton* expressly declined to rule on the very proposition for which the majority relies on it: whether nonstatutory review of allegedly *ultra vires* Presidential action is ever available. The opinion assumed that "some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA." *Dalton,* 511 U.S. at 474, 114 S.Ct. 1719. Justice Blackmun's concurring opinion states strongly, without contravention, that, under the Court's holding, "neither a challenge to ultra vires exercise of the President's statutory authority nor a timely procedural challenge is precluded" from judicial review. *Id.* at 478, 114 S.Ct. 1719 (Blackmun, J., concurring in part and concurring in the judgment).

Second, both the majority and concurring opinions in *Dalton* rely heavily upon features peculiar to the statute there at issue-notably, the unfettered discretion granted to the President by the statute, which "[did] not at all limit the President's discretion in approving or disapproving the Commission's recommendations." *Id.* at 476, 114 S.Ct. 1719. Section 2451, by contrast, does not grant the President "unqualified" discretion. As the majority concedes, the limitations on the President's discretion in § 2451 make this case less like *Dalton* and more like *United States v. George S. Bush & Co.,* in which the Supreme Court stated that the President's actions were subject to review for "conformity with the statute." *George S. Bush & Co.,* 310 U.S. at 380, 60 S.Ct. 944. It is significant that two of the cases on which *Dalton* relies most heavily—*George S. Bush & Co.* and *Chicago & Southern Air Lines v. Waterman S.S. Corp.*—both contemplate the availability of judicial review of Presidential

actions for "conformity with the statute" or "regularity." *Id.; see also Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 105, 68 S.Ct. 431, 92 L.Ed. 568 (1948).

The D.C. Circuit has repeatedly confirmed the availability of such review. In *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 (D.C.Cir.1996), it explained that "*Dalton's* holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." It has since reiterated that principle on several occasions in cases involving suits directly against the President acting in his official capacity under a statute granting him discretion. *See, e.g., Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C.Cir.2002) (stating that "Courts remain obligated to determine whether statutory restrictions have been violated. In reviewing challenges under the Antiquities Act, the Supreme Court has indicated generally that review is available to ensure that [the President's actions] are consistent with constitutional principles and that the President has not exceeded his statutory authority."); *Tulare County v. Bush*, 306 F.3d 1138, 1141 (D.C.Cir.2002) (reviewing whether Presidential proclamation made pursuant to his discretion under the Antiquities Act was within the "statutory standard").

In addition, this court's own precedent offers ample authority for the proposition that trade-related actions of the President taken pursuant to authority delegated by Congress are subject to review to determine whether that action "falls within his delegated authority, whether the statutory language

has been properly construed, and whether the President's action conforms with the relevant procedural requirements." *Florsheim Shoe Co. v. United States,* 744 F.2d 787, 795 (Fed.Cir.1984); *see also Maple Leaf Fish Co. v. United States,* 762 F.2d 86, 89 (Fed.Cir.1985) (concluding that "[f]or a court to interpose" in Presidential decisionmaking, "there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority"); *Humane Soc'y v. Clinton,* 236 F.3d 1320, 1330 (Fed.Cir.2001) (concluding that judicial review of discretionary Presidential decision under 16 U.S.C. § 1826a(b)(3)(A) was not available, but considering whether the President "acted in other than good faith" or "otherwise was in violation of his duties" under the statute). *See also Sneaker Circus, Inc. v. Carter,* 566 F.2d 396, 402 (2d Cir.1977) (concluding that although judicial review of Presidential trade negotiations was unavailable, the courts had authority to review "the procedures employed by the Executive in concluding these [trade] agreements, procedures which are mandated by statute"); *No Oilport! v. Carter,* 520 F.Supp. 334, 347 (W.D.Wash.1981) (stating that "[i]t is clear that this court may review . . . the President's actions to determine whether they complied with the procedural requirements imposed by" the Public Utilities Regulatory Act of 1978).

The majority's assertion that Motion Systems fails to state a colorable claim of *ultra vires* action is dubious. A "colorable claim" is merely one which is not "frivolous." *See, e.g., S. Illinois Carpenters Welfare Fund v. Carpenters,* 326 F.3d 919, 923 (7th Cir.2003) (holding that "a colorable claim is merely one that is not frivolous"); *Davis v.*

Featherstone, 97 F.3d 734, 737-38 (4th Cir.1996) (holding that "A claim is colorable if it is arguable and nonfrivolous, whether or not it would succeed on the merits."); *Harline v. Drug Enforcement Agency*, 148 F.3d 1199, 1203 (10th Cir.1998) (holding that a federal claim is not colorable only "if it is immaterial, and made solely for the purpose of establishing [federal] jurisdiction or . . . is wholly insubstantial or frivolous"); *Boettcher v. Sec'y of Health & Human Servs.*, 759 F.2d 719, 722 (9th Cir.1985) (holding that a federal claim is non-colorable only if it is "wholly insubstantial, immaterial, or frivolous"). Here, Motion Systems' complaint was brought against Presidential action taken pursuant to a statute that dictates the scope of the President's authority and the manner of its exercise. The complaint repeatedly describes the President's actions as "*ultra vires.*" It identifies portions of the statute that Motion Systems believes have been violated. To conclude that Motion Systems' claim is non-colorable simply re-defines the notion of colorability to be synonymous with "meritorious." I disagree with the majority's attempt to dispose of the merits without addressing the more difficult jurisdictional question that is necessarily a predicate to such a disposition.

Where, as here, the plaintiff has alleged that the President's actions are "*ultra vires,*" in the sense that the standards for action "imposed by Congress [have] not been met," I read the applicable authorities to permit and indeed to require judicial review of whether or not he acted within the discretionary range of the statutory mandate. I believe Motion Systems has standing to challenge the President's actions for this purpose.

II.

Having determined that standing exists, it is necessary to assess jurisdiction under § 1581(i), which provides that the Court of International Trade shall have exclusive jurisdiction over "any civil action commenced against the United States, its agencies, or its officers" arising out of certain trade and tariff laws. The question is whether the category of "officer" identified in the statute includes the President, for if it does, review authority is assigned by statute, and is not subject to repulse by the court to which it is assigned.

The phrase "the United States . . . or its officers" naturally calls to mind the constitutional class of "officers of the United States," as that term is used in the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and the Commission Clause, art. II, § 3. Indeed, in cases involving the applicability of statutory references to "officers" of the United States, the courts have generally held that such references are limited to officials who are subject to the provisions of the Appointments Clause. *See, e.g., Steele v. United States,* 267 U.S. 505, 507, 45 S.Ct. 417, 69 L.Ed. 761 (1925) (stating that "the words 'officer of the United States,' when employed in the statutes of the United States, [are] to be taken usually to have the limited constitutional meaning' of a person appointed under Appointments-clause procedures."); *United States v. Mouat,* 124 U.S. 303, 23 Ct.Cl. 490, 8 S.Ct. 505, 31 L.Ed. 463 (1888).

The question before us here, however, is very different. This case deals not with a Bureau of Prisons doctor (*United States v. Germaine,* 99 U.S. 508, 25 L.Ed. 482 (1878)), a navy paymaster clerk (*Mouat*), a customs clerk (*United States v. Smith,* 124 U.S. 525, 8 S.Ct. 595, 31 L.Ed. 534 (1888)), or a Naval Academy cadet (*United States v. Perkins,* 116 U.S. 483, 21 Ct.Cl. 499, 6 S.Ct. 449, 29 L.Ed. 700 (1886)), but with the President of the United States-a constitutional official who is plainly *not* an "officer of the United States" for Appointments Clause purposes but whose office is created by the Constitution itself. The question before us is whether a person holding a constitutionally recognized position, such as the President or a member of Congress, which is not by its terms subject to the provisions of the Appointments Clause, is nevertheless an officer of the United States for statutory purposes.

The Supreme Court has addressed this question directly, and answered it "yes." In *Lamar v. United States,* 241 U.S. 103, 36 S.Ct. 535, 60 L.Ed. 912 (1916), the Court considered whether a man impersonating a member of Congress could be charged under a statute making it a crime to " 'falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the government thereof.' " *Lamar v. United States,* 241 U.S. at 111, 36 S.Ct. 535 (quoting statute). The defendant argued that the indictment stated no offense against him, "because a member of the House of Representatives . . . is not an officer acting under authority of the United States" within the meaning of the statute and unspecified "provisions of the Constitution." *Id.* at 112, 36 S.Ct. 535.

The Supreme Court disagreed, concluding that "the issue here is not a constitutional one, but who is an officer acting under the authority of the United States within the provisions" of the statute at issue. *Id.* That question, the Court ruled, "must be solved by the text of the provision, not shutting out as an instrument of interpretation proper light which may be afforded by the Constitution." *Id.*

Lamar stands for the proposition that where the alleged officer is a constitutionally recognized person, rather than merely a minor government official, the simple presumption of *Germaine* and its progeny—that statutory references to "officers of the United States" include only such officials as fall within the terms of the Appointments Clause—does not apply. The President, as holder of the constitutional office of the Presidency,[2] is more closely analogous to a member of Congress than to a minor functionary like the prison doctor in *Germaine*. The analysis used by the Supreme Court in *Lamar* is, therefore, the applicable analysis here. That analysis requires simple statutory construction undertaken in light of possible constitutional questions.

The first question before the Court, then, is whether Congress, in enacting 28 U.S.C. § 1581(i), intended the words "the United States . . . or its officers" to include the President. In considering that question the court should consider the issues addressed by the Supreme Court in *Lamar:* the ordinary meaning of the word "officer"; the existence of other

2. *See, e.g.*, U.S. Const. art. II, § 1, cl.1 (vesting the executive power in the President, who "shall hold his Office during the Term of four Years"); art. II, § 1, cl.5 (referring to the "Office of President").

statutory provisions that consider the President to be an officer; and the consistency of such officer status with Supreme Court and other analogous precedent. *See Lamar,* 241 U.S. at 113, 36 S.Ct. 535. *See also Operation Rescue Nat'l v. United States,* 975 F.Supp. 92, 103-04 (D.Mass.1997), *aff'd,* 147 F.3d 68 (1st Cir.1998) (applying *Lamar* analysis to determine whether members of Congress are "employees" of the government for purposes of the immunity provisions of the Federal Tort Claims Act and concluding that they are both "employees" and "officers"). Second, the court must consider whether the inclusion of the President within the class of officers in § 1581(i) runs afoul of constitutional principles.

A. Statutory Construction

In interpreting a statute, "our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd. v. United States,* 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (Rehnquist, C.J., plurality opinion). In construing statutory language, we begin with the "assumption that the ordinary meaning of [Congress'] language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.,* 541 U.S. 246, 252, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004). The Supreme Court frequently repairs to dictionary definitions to ascertain the "ordinary meaning" of statutory text that does not arise in a technical context. *See id.* at 252-53, 124 S.Ct. 1756 (using dictionary definition to construe Congress' intent in using the word "standard"); *see also Lamar,* 241 U.S. at 113, 36 S.Ct. 535 (using dictionary definitions to construe Congress' intent in using the word

"officer" and concluding that "officer" included members of Congress). Here, the statute applies to "the United States . . . or its officers." 28 U.S.C. § 1581(i).

With regard to the "common understanding" of the word "officer," as "expressed in the ordinary, as well as legal, dictionaries," *Lamar,* 241 U.S. at 113, 36 S.Ct. 535, one finds that, "in public affairs," the term "officer" refers to a person "holding office of trust, command, or authority in corporation, government . . . or other institution." *Black's Law Dictionary* 977 (5th ed.1979).[3] The magisterial *Oxford English Dictionary* defines "officer" as, among other things, "a person authoritatively appointed or elected to exercise some function pertaining to public life, or to take part in . . . the management or direction of a public corporation, institution, etc." and "[a] person holding office and taking part in the management or direction of a society or institution, esp. one holding the office of president, treasurer, or secretary; an office-bearer."[4] 10 *Oxford English Dictionary* 732 (2d. ed.1989). Ordinary usage confirms these definitions: the officers of a corporation, for example, typically include its president.

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3. The same dictionary's definitions of "United States officer" and "officer of the United States," are unhelpful here: they apply to situations as in *Germaine, Mouat,* and *Steele,* which, as discussed, are irrelevant to the question of whether a constitutional officer (as opposed to a minor executive branch official) is an "officer of the United States."

4. *See also Webster's New International Dictionary* 1567 (1961) ("One who holds an office: one who is appointed or elected to serve in a position of trust, authority, or command esp. as specif. provided

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The second factor considered by the Supreme Court in *Lamar* was the existence of other statutes in which the term "officer" was found to include members of Congress. *See Lamar,* 241 U.S. at 113, 36 S.Ct. 535. The President of the United States may be an "officer" for some statutory purposes, but not for others. Some statutes by their terms include the President in the class of statutory officers. In the Impoundment Control Act, for example, § 686(a) refers to "the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any *other* officer or employee of the United States." 2 U.S.C. § 686(a) (emphasis added). The succeeding section empowers the Comptroller General to bring a civil action in district court to force the government to make available necessary budget authority and empowers the district courts to enter an order against "any department, agency, officer or employee of the United States"—a grouping which, read in conjunction with the "or other officer" language of § 686(a), clearly includes the President. *See* 2 U.S.C. § 687; *see also* 3 U.S.C. § 303 (defining "function" to include "any duty, power, responsibility, authority, or discretion vested in *the President or other officer* concerned") (emphasis added).

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by law"); *American Heritage Dictionary* 1220 (2000) ("One who holds an office of authority or trust in an organization, such as a corporation or government"); *The New Oxford American Dictionary* 1188 (2001) ("a holder of a public, civil, or ecclesiastical office"; "a holder of a post in a society, company, or other organization, esp. one who is involved at a senior level of its management").

Other statutes appear to recognize that the President is included in the class of officers by negative implication: the federal law proscribing bribery, for example, applies to persons who are "officer[s] or employee[s] . . . of the United States," but expressly carves out the President from that classification, suggesting that in the absence of the exception the class would include the President. *See* 18 U.S.C. § 203(a)(1)(B), § 202(c).

In addition, the courts have ruled on several occasions that the federal mandamus law, which by its terms applies to "officer[s] and employee[s] of the United States," applies to the President. *See, e.g., Nat'l Treasury Employees Union v. Nixon,* 492 F.2d 587, 602, 616 (D.C.Cir.1974) (concluding that the President is subject to mandamus proceedings under 28 U.S.C. § 1361 but refraining from issuing the writ); *Nat'l Wildlife Fed. v. United States,* 626 F.2d 917, 923 (D.C.Cir.1980) (holding that "[m]andamus is not precluded because the federal official at issue is the President of the United States"); *Swan v. Clinton,* 100 F.3d 973, 976 n. 1 (D.C.Cir.1996) (finding that the "prerequisites for stating a cause of action under the mandamus statute are met" in an action against President Clinton).

The executive branch's own lawyers have concluded on many occasions that the President is a statutory officer of the United States. In fact, they have done so in this case: government counsel, in the first oral argument conducted in this matter, stated that "the President is an officer of the United States." Executive branch counsel have also concluded, in a reasoned opinion, that a general statutory reference to "officers" included the President. Section 603

of Title 18 of the United States Code prohibits any "officer or employee of the United States" from making certain political contributions. The Office of Legal Counsel, relying in part on legislative history,[5] concluded in a published opinion that "the better view, in our judgment, is that the President does, indeed, fall within the terms of" the statute's class of "officers." *See* 3 U.S. Op. Off. Legal Counsel 31, 39 (1979). The Office of Legal Counsel and other executive branch lawyers have considered the President to be an officer for a variety of statutory and other purposes. *See* 38 U.S. Op. Atty. Gen. 445 (April 9, 1936) (construing statute applying to "the Secretary of the Treasury or any other officer of the Government" to include the President as such an officer); 20 U.S. Op. Off. Legal Counsel No. 124 (May 7, 1976) (referring to "an officer who is subject to control and removal by an officer other than the President"); 19 U.S. Op. Off. Legal Counsel 93 (June 3, 1986) (referring to "executive officers other than the President"); 6 U.S. Op. Off. Legal Counsel 751 (December 14, 1982) (referring to "Executive officers other than the President"); 21 U.S. Op. Atty. Gen. 494 (February 11, 1897) (referring to the Secretary of the Treasury or "any other officers save the President"); 13 U.S. Op. Atty. Gen. 479 (referring to the inability of "any officer but the President" to remit a criminal sentence); 1 U.S. Op. Atty. Gen. 566 (September 27, 1822) (referring to the President as "the executive officer of the laws of the country").

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5. The legislative history of § 1581(i) is silent on the question of who constitutes an "officer" for statutory purposes.

Similarly, the President has, on many occasions, referred to himself as an officer. *See, e.g.*, Executive Order No. 11827 (Jan. 4, 1975) (referring to advisory committees "created by the President or any other officer of the Executive Branch" under the Federal Advisory Commission Act); Executive Order No. 11609 (July 26, 1976) ("Delegating Certain Functions Vested in the President to Other Officers of the Government"); Executive Order No. 11480 (September 9, 1969) (referring to actions taken "by the President or by any other officer of the Executive Branch"); Executive Order No. 11435 (January 21, 1968) (referring to actions "of the President or of any other officer of the United States"); Executive Order No. 10994 (February 14, 1962) (referring to prior orders of "the President or . . . any other officer of the Executive Branch"); Executive Order No. 10640 (October 10, 1955) (same); Executive Order No. 10167 (October 11, 1950) (referring to "the President or such other officer as he may designate").

In addition, the Supreme Court has frequently identified the President as an officer, and specifically as "the chief constitutional officer of the United States." *Nixon v. Fitzgerald,* 457 U.S. 731, 750, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); *see also Clinton v. Jones,* 520 U.S. 681, 699 n. 29, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (quoting *Fitzgerald*); *Franklin v. Massachusetts,* 505 U.S. 788, 799, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (referring to the President as a "constitutional officer"); *Cheney v. U.S. District Court for the District of Columbia,* 541 U.S. 913, 916, 124 S.Ct. 1391, 158 L.Ed.2d 225 (2004) (Justice Scalia, writing as a single justice, referring to "the President and other officers of the Executive"); *Menard's Heirs v. Massey,*

49 U.S. 293, 309, 8 How. 293, 12 L.Ed. 1085 (1850) (referring to "the President or some other officer"); *U.S. Ex. Rel. Goodrich v. Guthrie,* 58 U.S. 284, 310, 17 How. 284, 15 L.Ed. 102 (1854) (McLean, J., dissenting) (stating that "the President, like all the other officers of the government, is subject to the law"); *Embry v. United States,* 100 U.S. 680, 685, 25 L.Ed. 772 (1879) (referring to "[n]o officer except the President"); *United States v. McDonald,* 128 U.S. 471, 473, 24 Ct.Cl. 524, 9 S.Ct. 117, 32 L.Ed. 506 (1888) (quoting *Embry*); *United States v. Am. Bell Tel.,* 128 U.S. 315, 363, 9 S.Ct. 90, 32 L.Ed. 450 (1888) (referring to "the president . . . or any other officer of the government"); *In Re Sealed Case,* 121 F.3d 729, 748 (D.C.Cir.1997) (the President is "the chief constitutional officer" of the United States).

Congress has spoken of the President as an "officer" in other contexts: the Senate report addressing the amendment of the apportionment statute at issue in *Franklin v. Massachusetts* stated explicitly that the amended statute required participation by the President, rather than by the Secretary of Commerce, "so that this function may be served by a constitutional officer." S.Rep. No. 2, 71st Cong., 1st Sess., at 5 (1929) (quoted in *Franklin v. Massachusetts,* 505 U.S. at 800, 112 S.Ct. 2767).

Considered together with the Constitution's express identification of the Presidency as an "office"; the consistency of Supreme Court identification of the President as an officer of the United States; and the plain and commonplace understanding of the term "officer" to include public officials like the President, these examples leave no doubt that the President is an officer of the United States. The next question

is whether Congress included the President in the class of "officers" defined by 28 U.S.C. § 1581(i). I conclude that it did.

Section 1581(i) creates jurisdiction over civil actions against "the United States, its agencies, or its officers," arising out of any law of the United States providing for—

(1) revenue from imports or tonnage;
(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581(i). Section 1581(i) is a "broad jurisdictional grant," enacted by Congress as a "residual" source of jurisdiction to supplement the more specific provisions of § 1581(a)-(h) and "eliminate the confusion which currently exists between the jurisdiction of the district courts and the Court of International Trade," and clarify that "all of the suits of the type specified [in § 1581(i)] are properly commenced only in the Court of International Trade." H.R.Rep. No. 1235, 96th Cong., 2d. Sess. 47 (1980). The "type specified" in § 1581(i) is lawsuits arising out of a broad array of trade laws in which the President, acting on authority delegated by Congress, plays an unusually significant role.

Section 1581(i)(3), for example, applies to actions arising out of "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety." 28 U.S.C. § 1581(i)(3). Embargoes are an element of international affairs in which the President plays a signature, and even dominant, role. *See, e.g.*, 22 U.S.C. § 6032(c) (ordering the President to "instruct the Secretary of the Treasury and the Attorney General to enforce fully the Cuban Assets Control Regulations"); 50 U.S.C. § 1707(b) (requiring the President, within 20 days after the start of hostilities with a foreign nation, to "submit to Congress a report setting forth . . . the specific steps the United States has taken . . . to establish a multinational economic embargo"); 22 U.S.C. § 408 (authorizing the President to "employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purposes of" provisions regulating trade with hostile nations); 22 U.S.C. § 2370 (authorizing the President to "establish and maintain a total embargo upon all trade between the United States and Cuba"). More important, perhaps, is the statute's exclusion from its jurisdictional grant of precisely the kinds of embargoes in which the President plays *no* role. By excluding from jurisdiction suits arising out of embargoes imposed "for the protection of the public health and safety," the statute excludes most existing embargoes, including, for example, those relating to adulterated foods and unapproved drugs (*see* 21 U.S.C. § 381), nonconforming products (*see* 15 U.S.C. § 1192), and toxic substances (*see* 15 U.S.C. § 2612). The provisions of § 1581(i)(3), in short, are heavily focused on precisely those areas of trade law in which the President is assigned a role. The same is true for § 1581(i)(2), which applies to actions

arising out of "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2). The President plays little, if any, role in the revenue-raising portions of the tariff laws, but is assigned a substantial role in the use of tariffs for other purposes. *See, e.g.,* 19 U.S.C. § 2461 (authorizing the President to provide duty-free treatment from certain developing countries, taking "due regard for" considerations such as "the effect such action will have on furthering the economic development of developing countries").

The legislative history of § 1581(i), although not dispositive of this issue, suggests that Congress did not exclude this aspect of the trade laws from the general compass of the Court of International Trade. In the Senate hearings regarding S. 2857-a predecessor to the bill that became the Customs Courts Act of 1980-Assistant Attorney General Babcock, discussing the jurisdictional confusion that S. 2857, and later § 1581, were designed to remedy, cited *Sneaker Circus, Inc. v. Carter,* 566 F.2d 396 (2d Cir.1977) as an example of the kind of case that should be heard by the then-named Customs Court. Asked whether the proposed legislation would grant the Customs Court jurisdiction to hear Sneaker Circus' suit against the President, Babcock replied that "that is the object, the real object of the bill. The real object is that that case would very clearly be headed for the Customs Court." Senate Hearings on S. 2857, June 23 and 27, 1978, 95th Cong., 2d. Sess., at 65-66. The House Report on the Customs Courts Act also referred specifically to *Sneaker Circus*-which was heard by the Second Circuit–as an example of the jurisdictional "confusion" that § 1581(i) was intended to remedy. The legislative history suggests that

Congress was aware of, and approved of, the possibility that what is now the Court of International Trade could exercise jurisdiction over suits under the trade laws, not excluding those actions performed by the President and other officers of the United States.

I conclude, therefore, that Congress intended § 1581(i)'s reference to "officers" to include the President of the United States, subject to constitutional implications, to which I now turn. *See Lamar,* 241 U.S. at 112, 36 S.Ct. 535 (concluding that although "the issue here is not a constitutional one," it must be considered in the "proper light . . . afforded by the Constitution").

B. Constitutional Considerations

To address the issues presented by this appeal, the court need not reach the overall implications of whether the President is or is not an "officer of the United States" for constitutional purposes.[6] It need only consider whether the designation of the President of the United States as an officer of the United States in administration of the trade statute raises intractable constitutional difficulties. I conclude that it does not.

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6. There has been lively academic debate on that issue, mostly as an offshoot of discussions of legislative succession. Akhil Amar and Vikram Amar conclude that the President is an "Officer of the United States" for constitutional purposes. *See* Akhil Reed Amar and Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L.Rev. 113, 136 n. 143 (1995) ("If an acting President, wielding the full and awesome executive power of the United States, is not an 'Officer of the United States,' what is he?")

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Appendix A

The Constitution repeatedly designates the Presidency as an "Office," which surely suggests that its occupant is, by definition, an "officer."[7] *See, e.g.*, U.S. Const. art. I, § 3, cl. 5; art. II, § 1, cl. 1; art. II, § 1, cl. 5; art. II, § 1, cl. 6; art. II, § 1, cl. 8; amend. XXII, § 1; amend. XXV, § § 1, 3, 4. An interpretation of the Constitution in which the holder of an "office" is not an "officer" seems, at best, strained. It is true, however, that our understanding of the category of "officers of the United States" comes primarily from the Appointments Clause and the jurisprudence associated with it.[8] The Appointments Clause and the Commissions Clause, by their

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Steven Calabresi agrees. *See* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 Stan. L.Rev. 155, 158 n. 24 (1995) ("The best reading . . . is that the President and the Vice President are the 'Officers of the United States' contemplated by the language in the Appointments Clause referring to 'all other Officers of the United States, whose Appointments are not herein otherwise provided for.' ") John Manning disagrees. *See* John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L.Rev. 141, 146 (1995) (questioning whether one who "holds" the office of the Presidency is therefore an "officer of the United States.").

7. If this is not sufficiently obvious on its face, *see, e.g.*, 10 *Oxford English Dictionary* 732 (2d. ed.1989), defining "officer" as "one who holds an office."

8. The full text of the Appointments Clause reads:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls,

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terms, apply to all "officers of the United States" and all "civil officers of the United States," respectively. *See id.* at art. II, § 2, cl. 2; art. II, § 3; art. II, § 4. Those clauses, and other constitutional provisions,[9] contemplate a class of "officers" inferior in status to the President, who nominates and commissions them. The key features of that class are nomination by the President, appointment with the advice and consent of the Senate, commission by the President, and removal by impeachment. It is plain that the President is not an "officer of the United States" for Appointments Clause, Commission Clause, or Oath of Office Clause purposes.[10]

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> Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl.2.

9. *See, e.g.*, the Oath of Office Clause, art. VI, cl.3 (requiring an oath of office for, *inter alia*, "all executive and judicial officers"). The President's oath of office is separately required by Article II, Section 2, clause 8, suggesting that he is not among the "executive officers" governed by Article VI, clause 3.

10. The Impeachment Clause presents a slightly different case. That clause provides for impeachment of "The President, Vice-President and all civil officers of the United States." U.S. Const. art. II, § 4. This is ambiguous on its face: depending on which canon of construction one prefers, it might mean that impeachment applies to all civil officers of the United States and also to the President and

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The question then remains whether the inapplicability of those clauses to the President creates a constitutional barrier to his inclusion as an "officer" for purposes of § 1581(i). I conclude that it does not, for two reasons. First, although the Appointments Clause and its relations do contemplate a class of "Officers of the United States" that is inferior to and does not include the President, there is reason to believe that the inferior class of appointed officials denominated as "Officers of the United States" is nonexclusive. That is, the Constitution suggests that high elected officials-including the President and members of Congress-are officers for constitutional or statutory purposes despite their separate status from persons governed by the Appointments Clause. Second, the constitutional principles

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Vice-President, who are not such officers; or it might mean that that the President and Vice-President are examples of the category of civil officers of the United States. It could be read, in other words, to support two contradictory interpretations of the President's status as officer. No less a constitutional authority than Justice Story appears to have held contradictory views about whether the President and Vice-President are "civil officers". In one passage of his *Commentaries,* for example, he argued that the Impeachment Clause "does not even consider [the President and Vice President] officers of the United States," because "[i]t says, 'the president, vice-president, and all civil officers (not all other civil officers) shall be removed . . . . The language of the clause, therefore, would rather lead to the conclusion that they were enumerated as contradistinguished from, rather than as included in, the description of civil officers of the United States.' " Joseph Story, *Commentaries on the Constitution of the United States* 2, § 791 (1833). Only a few pages before, however, Story described the remedy of impeachment as being "strictly confined *to civil officers of the United States, including the President and Vice-President.*" *Id.* at § 787 (emphasis added).

and values that underlie the Appointments Clause and the limitations it places upon the officials to whom it applies are not threatened by the identification of the President as an "officer" for purposes of section 1581(i).

The Incompatibility Clause, Art. I, § 6, cl. 2, for example, makes clear that members of Congress cannot hold appointed office under the United States, but the courts have consistently concluded that members of Congress are "officers of the United States" for purposes of various federal statutes. *See, e.g., Lamar,* 241 U.S. 103, 36 S.Ct. 535, 60 L.Ed. 912; *Operation Rescue Nat'l v. United States,* 975 F.Supp. at 103-04 (holding that a member of Congress is an officer of the United States for purposes of 28 U.S.C. § 2671); *Maddox v. Williams,* 855 F.Supp. 406 (D.D.C.1994), *aff'd,* 62 F.3d 408 (D.C.Cir.1995) (holding that a member of Congress is an officer of the United States for purposes of 28 U.S.C. § 1442(a)); *Williams v. Brooks,* 945 F.2d 1322, 1324 n. 2 (5th Cir.1991) (same); *Richards v. Harper,* 864 F.2d 85, 86 (9th Cir.1988) (same); *Hill Parents Ass'n v. Giaimo,* 287 F.Supp. 98, 99 (D.Conn.1968) (same); *Preston v. Edmondson,* 263 F.Supp. 370, 372 (N.D.Okla.1967) (same).

Appendix A

The Senate itself has concluded that Senators are *not* "officers of the United States"[11] for purposes of the Impeachment Clause,[12] but *do* hold a "civil office" in the government of the United States for purposes of an oath-of-office statute.[13]

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11. Note also that the statute at issue in the oath-of-office debate applied to persons holding "offices" under the United States government, but specifically excepted the President of the United States-suggesting the understanding that without such an exception the President would have been subject to the statute.

12. This principle has been accepted since 1799, when the Senate, presented with articles of impeachment against Senator William Blount, concluded after four days of debate that a Senator was not a "civil officer of the United States" for purposes of the Impeachment Clause. *See Senate J.*, 5th Cong., 3d Sess., 17 December 1798-10 January 1799.

13. *See* Cong. Globe, 28th Cong., 1st Sess., 26 January 1864 (floor debate regarding whether legislation requiring an oath of office for "every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military, or naval departments of the public service" applied to Senators). Despite bitter opposition, proponents of the view that a Senate seat is a civil office of the United States prevailed by a vote of 28-11. The arguments made by the prevailing Senators anticipated, with remarkable precision, the Supreme Court's analysis in *Lamar* fifty years later: Senator Sumner of Massachusetts, for example, arguing successfully for the position that Senators did hold "offices" for purposes of the statute, noted that the constitutional definition of "officers of the United States" was not controlling, and pointed to the common understanding of the word "officer," dictionary definitions of same, and other constitutions and statutes that assumed the officer status of legislators. *Cf. Lamar*, 241 U.S. at 112-13, 36 S.Ct. 535.

In addition, consideration of the constitutional principles embodied in the Appointments Clause and the limitations it places on "Officers of the United States" leads us to conclude that those principles are unthreatened by the identification of the President as an officer for statutory purposes. The constitutional clauses governing "officers" serve to ensure that the responsible agents of government are subject to defined constitutional controls-primarily nomination, appointment, consent, and impeachment. These requirements exist to effect two core constitutional principles: political accountability and separation of powers. *See, e.g., Edmond v. United States,* 520 U.S. 651, 660, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997) (stating that "the Appointments Clause was designed to ensure public accountability"); *see also Weiss v. United States,* 510 U.S. 163, 186, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994) (Souter, J., concurring in the judgment) (stating that "the Appointments Clause separates the Government's power but also provides for a degree of intermingling, all to ensure accountability"); *Freytag v. Comm'r,* 501 U.S. 868, 878-80, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (emphasizing the separation-of-powers principles "embedded in the Appointments Clause," which are "structural and political" and articulate "a limiting principle" for both the executive and Congress).

To the extent that the qualifications demanded of "Officers of the United States" are rooted in the need to provide political accountability to officials exercising significant government authority, there is clearly no harm in identifying the President-the most politically accountable of all national figures-as such an officer. To the extent that those qualifications are based upon separation of powers principles,

those considerations arise not in the identification of the President as an officer of the United States, but in the substance of what Congress is attempting to achieve by that identification. It is difficult to understand, in the context of section 1581, how the mere exercise of jurisdiction over the President threatens the separation of powers. In this regard it is sufficient to note that the President's duties under the Trade Act were delegated by Congress. There is no doubt that, to the extent Congress chose to grant the President discretion in exercising those duties, the exercise of his discretion within the statutory assignment is not subject to judicial review. Whether the courts may exercise jurisdiction over the President—in order, for example, to review whether the President acted "in full conformity with the statute," as permitted in the trade context by the Supreme Court's decision in *George S. Bush & Co.*—is a wholly different question, and one that does not significantly implicate the separation of powers.

There remains one issue that merits discussion. The Supreme Court, in *Franklin v. Massachusetts,* has held that the President is not an "agency" subject to suit under the Administrative Procedure Act. In *Franklin,* the Court declared, "[o]ut of respect for the separation of powers and the unique constitutional status of the President," that it would not subject the President to a statutory provision without an "express statement by Congress" that the provision was meant to include the President. *Franklin v. Massachusetts,* 505 U.S. at 800-01, 112 S.Ct. 2767.

Franklin is readily distinguishable from the present case. First, as a matter of plain meaning, the President is an unlikely candidate for "agency" status. The common-sense answer to the question, "Is the President an 'agency'?" seems to be "clearly not." The common-sense answer to the question, "Is the President an 'officer of the United States' "? is clearly "yes." Indeed, the government's own counsel, at oral argument, answered that question affirmatively. Second, by its own terms, Franklin applies only to a statutory provision that would make the President's "performance of his statutory duties" reviewable for "abuse of discretion." *Id.* at 801, 112 S.Ct. 2767. It says nothing about the less troubling circumstance in which the President's actions are reviewed only for conformity with the statutory grant.

In addition, there is no suggestion in *Franklin* that there is any significant historical support for the notion that the term "agency" includes the President. There is, however, massive historical support-in the Constitution itself, in two centuries of Supreme Court jurisprudence, in significant opinions of the lower courts, in federal statutes, and in myriad other sources-for the proposition that the President is an "officer" of his country. The use of the word "officer" in § 1581(i)—a statute that creates jurisdiction over matters of international trade in which the President exercises significant delegated authority—is an "express statement" that the President is subject to jurisdiction under that statute. In this connection, I note that *Franklin* itself expressly refers to the President as a "constitutional officer." *Id.* at 799, 112 S.Ct. 2767.

Finally, I note that whereas the identification of the President as an "agency" for APA purposes would potentially expose the President to litigation on innumerable causes of action, the identification of the President as an officer for purposes of § 1581(i) would subject him to jurisdiction only in the limited context of actions arising out of specified areas of trade law-an area in which the President has traditionally been subject to jurisdiction. *See, e.g., George S. Bush & Co.; Florsheim Shoe Co. v. United States,* 744 F.2d at 795; *Maple Leaf Fish Co.,* 762 F.2d at 89. In short, the case at bar presents very different issues than those faced by the Supreme Court in *Franklin.*

I conclude, therefore, that the phrase "the United States . . . or its officers" in the statute encompasses the President of the United States. Motion Systems therefore has a right to judicial review of the President's actions, and the Court of International Trade properly exercised jurisdiction over that action.

III.

Having concluded that this action was properly before the Court of International Trade, it is necessary to consider the merits of that court's decision. The President is charged by statute to balance the economic impact on the American manufacturer who is injured by competition with "dumped" foreign goods, against the benefit to the importer and potentially to the consumer of lower foreign prices. Such an economic analysis involves the responsibilities and interests of government, industry, labor, and the consumer, and the balancing thereof was quite reasonably assigned by Congress

to the topmost official of the executive branch. However, this assignment did not remove trade law from its constitutional design: the assignment was made by the legislative arm, which is responsible for trade and customs law; it is administered by the executive arm, as for most laws; and challenge to the law or its administration, when raised by "case or controversy," is the responsibility and authority of the judicial arm. I agree with the conclusion of the Court of International Trade that there is "no basis to conclude that the President's decision is based on a 'clear misunderstanding of the governing statute' or that it constituted 'action outside his delegated authority.' " I would affirm its decision on the merits.

CONCLUSION

We granted this rehearing *en banc* to consider several significant questions of law. The majority has avoided most of these issues in favor of the dubious proposition, never advanced by any party to this action, that Motion Systems has no right to any judicial review of Presidential action taken pursuant to the statute. In order to avoid the very issues we took this case *en banc* to resolve, the majority misreads and misapplies applicable Supreme Court authority and, in so doing, adopts an indefensibly cramped view of the judiciary's constitutional role as a check and balance to its coordinate and co-equal branches of government.

When Congress has delegated its constitutional authority to the President, and the statute contemplates presidential action within statutory parameters, the courts must determine whether these parameters were respected. The judicial role

is to review whether the presidential action is in performance of the statutory assignment, and the extent of executive discretion in that performance. No court, until today, has held that all inquiry is foreclosed as to whether the action complained of is within the statutory assignment and the discretionary authority assigned by Congress. I respectfully object to the majority's unwarranted disruption of the constitutional balance under which we all serve.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE, DATED JUNE 3, 2004

UNITED STATES COURT OF
INTERNATIONAL TRADE

Slip Op. 04-58

Court No. 03-00146

MOTION SYSTEMS CORPORATION,

Plaintiff,

v.

GEORGE W. BUSH, President of the United States, and
ROBERT B. ZOELLICK, United States
Trade Representative,

Defendants,

and

CCL INDUSTRIAL MOTOR LTD.,

Defendant-Intervenor.

Decided: June 3, 2004

Before Timothy C. Stanceu

[Summary judgment granted for defendants]

Appendix B

OPINION

STANCEU, Judge.

Plaintiff Motion Systems Corporation challenges a decision by the President of the United States to deny import relief to the U.S. industry manufacturing "pedestal actuators," which are components of electrically-powered vehicles used by persons whose mobility is impaired. Plaintiff's principal argument is that the President exceeded his statutory authority in declining to impose import quotas on pedestal actuators from the People's Republic of China ("China") following a recommendation by the United States International Trade Commission that import quotas are needed to remedy "market disruption" adversely affecting the U.S. pedestal actuator industry. Plaintiff contends in particular that the President acted contrary to the relevant statute in denying relief without quantifying the adverse impact of providing relief and demonstrating that this adverse impact was "clearly greater" than the benefits that such relief would provide to the domestic industry.

Motion Systems has named as defendants the President and the United States Trade Representative, who issued a recommendation to the President addressing the issue of import relief after publishing a notice soliciting comment and conducting a public hearing. In addition to its primary argument, plaintiff raises objections to the U.S. Trade Representative's conduct of the public hearing, to the President's considering certain political factors that Motion Systems considers improper, and to the apparent denial of Motion Systems' request to the U.S. Trade Representative that the President reconsider the final decision.

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This matter is before the court on two motions by defendants. Defendants moved to dismiss for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1) and, previous to that motion, sought dismissal of this action through judgment upon an agency record pursuant to USCIT Rule 56.1.

This court concludes that it has subject matter jurisdiction of this case under 28 U.S.C. § 1581(i). This court further concludes that the President's decision declining to impose restraints on imports of pedestal actuators must be upheld because it is within the authority delegated to the President by the relevant statute. The court finds no basis to conclude that the presidential decision misconstrued statutory provisions or must be overturned for noncompliance with procedural requirements. Additionally, the court finds no basis to order a reopening of proceedings for reconsideration of the final presidential decision. Accordingly, for the reasons discussed below, defendants are entitled to judgment as a matter of law.

I. BACKGROUND

The pedestal actuators imported from China, and the pedestal actuators manufactured in the United States by Motion Systems Corporation, are motor-driven mechanical devices chiefly used as components in mobility scooters and electric wheelchairs. As typically installed in a mobility scooter or electric wheelchair, a pedestal actuator converts rotary motion, created by the electric motor, to the linear motion required to raise and lower the seat.

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Motion Systems Corporation sought import relief through the administrative proceedings summarized below. Electric Mobility Corporation, a manufacturer of mobility scooters and purchaser of Chinese-origin pedestal actuators, opposed the imposition of import relief in those administrative proceedings, as did defendant-intervenor CCL Industrial Motor Ltd., a Chinese manufacturer of pedestal actuators.

A. Procedures Leading to the President's Decision to Deny Relief

Motion Systems, on August 19, 2002, petitioned the U.S. International Trade Commission (the "USITC") for relief from imports of pedestal actuators from China, under procedures established by section 421 of the Trade Act of 1974, as amended (19 U.S.C. § 2451) ("Section 421"). Section 421, added to the Trade Act of 1974 by the U.S.-China Relations Act of 2000, establishes procedures under which the President, following an affirmative "market disruption" determination by the USITC, is empowered to proclaim "increased duties or other import restrictions" on a product of China that "is being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of a like or directly competitive product." 19 U.S.C. § 2451(a). "Market disruption" is found to exist "whenever imports of an article like or directly competitive with an article produced by a domestic industry are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury, to the domestic industry." 19 U.S.C. § 2451(c).

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The Section 421 procedures involve separate determinations by the USITC and potentially by the President, who is to make the actual decision whether or not to grant import relief after receiving a recommendation of the U.S. Trade Representative. To initiate the process, a domestic producer may petition the USITC to investigate whether a product of China is being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to domestic producers of like or directly competitive products. 19 U.S.C. § 2451(b).

The statute directs the USITC, upon making an affirmative determination of market disruption, to propose actions in the form of increased duties or other import restrictions necessary to prevent or remedy the market disruption. 19 U.S.C. § 2451(f). The statute further directs the U.S. Trade Representative, after receiving the report of the USITC, to publish in the Federal Register notice of any import relief measure the U.S. Trade Representative proposes to be taken and to invite public comment, with the opportunity to request a public hearing on the appropriateness of the proposed measure. 19 U.S.C. § 2451(h)(1). Further, the statute authorizes the U.S. Trade Representative to enter into agreements with the People's Republic of China under which China would take action to prevent or remedy market disruption and provides that the Trade Representative "should seek to conclude such agreements" within a 60-day period commencing five days after receiving an affirmative determination of the USITC. 19 U.S.C. § 2451(j)(1).

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Section 421 vests in the President the discretion whether to provide import relief. Within 15 days of receiving the Trade Representative's final recommendation, the President is directed to provide import relief for the domestic industry "unless the President determines that provision of such relief is not in the national economic interest of the United States" or, in extraordinary cases, that it would cause serious harm to the national security. 19 U.S.C. § 2451(k)(1). The import relief may take the form of increased duties or other import restrictions and is to remain in effect "for such period as the President considers necessary to prevent or remedy the market disruption." 19 U.S.C. § 2451(a).

The President's discretion to deny import relief following an affirmative USITC finding of market disruption is subject to specific limitations. The statute provides that "[t]he President may determine . . . that providing import relief is not in the national economic interest of the United States only if the President finds that the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action." 19 U.S.C. § 2451(k)(2).

In the proceedings leading up to this litigation, the USITC issued its report on the petition of Motion Systems on November 7, 2002, following the submission of briefs and a public hearing. *See Pedestal Actuators from China: Investigation No. TA-421-1,* USITC Pub. 3557. The USITC concluded in its report that pedestal actuators from China are being imported in such increased quantities or under such conditions as to cause market disruption to the domestic producers of like or directly competitive products. The

USITC proposed, as a remedy to the market disruption it had found to exist, a three-year period of quantitative restrictions on Chinese pedestal actuator imports, to consist of 5,626 units in the first year, 6,470 units in the second year, and 7,440 units in the third year.[1] *See International Trade Commission: Pedestal Actuators,* 67 Fed. Reg. 69,557, 69,558 (Nov. 18, 2002).

After seeking, unsuccessfully, an agreement with the People's Republic of China to prevent or remedy market disruption from pedestal actuator imports, and after inviting written comments[2] and conducting a public hearing, the U.S. Trade Representative submitted its recommendation to the President on January 2, 2003.[3] On January 17, 2003, the President issued a determination not to impose restrictive measures on imports of pedestal actuators from China.

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1. These quantitative limits were proposed by Vice Chairman Hillman and Commissioner Miller. As authorized by 19 U.S.C. § 2451(g)(2)(C), Commissioner Koplan separately proposed a three-year period of quantitative restrictions consisting of 4,425, 4,514, and 4,604 units per year, respectively. Chairman Okun and Commissioner Bragg made negative determinations concerning market disruption.

2. Office of the U.S. Trade Representative, *Notice of Proposed Measure and Opportunity for Public Comment Pursuant to Section 421 of the Trade Act of 1974: Pedestal Actuators from the People's Republic of China,* 67 Fed. Reg. 71,007 (Nov. 27, 2002) (*"USTR Notice"*).

3. The U.S. Trade Representative did not make public, and was not required by Section 421 to make public, its recommendation to the President.

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B. The President's Decision to Deny Relief to the Domestic Pedestal Actuator Industry

The President's decision was released in the form of a Federal Register notice setting forth a memorandum to the U.S. Trade Representative ("USTR" or "Trade Representative").[4] The decision included the following findings: (1) providing import relief for the U.S. pedestal actuator industry is not in the national economic interest; and (2) import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action.

The presidential decision went on to state four reasons for the decision, as follows: (1) the facts indicate that the USITC's recommended quota would not likely benefit the domestic industry and instead would cause imports to shift to other offshore sources; (2) even if the quota were to benefit the primary domestic producer (*i.e.*, Motion Systems), the cost of the quota to consumers, downstream purchasers of pedestal actuators, and users of the downstream products would substantially outweigh any benefit to producers' income; (3) the cost of the quota would increase pressure on domestic producers of the downstream products (*i.e.*, mobility scooters and electric wheelchairs) to move offshore, causing more economic harm than good due to the larger number of workers in the downstream industry; and (4) the quota would negatively affect the many elderly and disabled

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4. The President, *Presidential Determination on Pedestal Actuator Imports from the People's Republic of China*, 68 Fed. Reg. 3,157 (Jan. 22, 2003).

purchasers of the downstream products. The portion of the presidential decision setting forth the two findings and the four aforementioned reasons reads as follows.

> After considering all relevant aspects of the investigation, I have determined that providing import relief for the U.S. pedestal actuator industry is not in the national economic interest of the United States. In particular, I find that the import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action.
>
> In determining not to provide import relief, I considered its overall costs to the U.S. economy. The facts of this case indicate that imposing the USITC's recommended quota would not likely benefit the domestic producing industry and instead would cause imports to shift from China to other offshore sources.
>
> Even if the quota were to benefit the primary domestic producer, the cost of the quota to consumers, both the downstream purchasing industry and users of the downstream products, would substantially outweigh any benefit to producers' income. The USITC's analysis confirms this conclusion.

In addition, downstream industries are already under pressure to migrate production offshore to compete with lower-cost imports of finished products. Higher component costs resulting from import relief would add to this pressure. Given the significantly larger number of workers in the downstream purchasing industry when compared with the domestic pedestal actuator industry, I find that imposing import restrictions would do more economic harm than good.

Finally, a quota would negatively affect the many disabled and elderly purchasers of mobility scooters and electric wheelchairs, the primary ultimate consumers of pedestal actuators.

C. Motion Systems' Request for Reconsideration of the President's Decision

Following issuance of the President's decision to deny import relief on Chinese-origin pedestal actuators, Motion Systems filed with the U.S. Trade Representative a submission, dated February 12, 2003, requesting "reconsideration" of that decision and citing "new evidence which has come to light since January 17, the date of the President's determination." The "new evidence" consisted of documents that Motion Systems presented in support of claims that Electric Mobility did not reduce the prices of mobility scooters it sold to the Department of Veterans Affairs and did not make an electrically-powered seat lift (which incorporates a pedestal actuator) standard equipment on 70 percent of its models. Motion Systems contended that this

"new evidence" contradicted statements made by the president of Electric Mobility Corporation ("EMC"), Michael Flowers, before the USTR hearing and raised credibility concerns. The post-decision submission stated as follows:

> If EMC did not, in fact, include the seat lift as standard equipment on 70 percent of its scooters, then that calls into serious question Mr. Flowers' claim that EMC reduced the prices for those scooters as a result of switching to the lower-priced Chinese unit, particularly since Mr. Flowers acknowledged that EMC did not reduce the price of the seat lift as an option. And if it is the case that EMC did not, in fact, reduce the prices when it switched to the Chinese unit, then it calls into question the credibility of Mr. Flowers' claim that EMC would be forced to increase its prices $200 if relief were granted. Once Mr. Flowers' testimony is put aside, there is no evidence to indicate the extent to which the costs of relief would outweigh the benefits.

Stewart and Stewart letter to USTR, February 12, 2003 at 16-17, in Pl.'s Ex. 2.

In a letter to counsel for plaintiff dated March 7, 2003, the Assistant U.S. Trade Representative for North Asian Affairs, in an apparent reference to the February 12, 2003 submission, acknowledged with appreciation the "supplemental information you have provided" but did not indicate that the President would reconsider the decision to deny import relief. The March 7, 2003 letter stated, *inter*

alia, that "[y]our letter points to evidence that, in your view, shows the sole U.S. purchaser of Chinese pedestal actuators, Electric Mobility, did not reduce prices for its mobility scooters and electric wheelchairs after it began sourcing pedestal actuators from China and thus did not pass along to consumers any cost savings." That letter went on to state that the issue whether Electric Mobility reduced its prices after purchasing Chinese pedestal actuators was clearly reflected "as disputed between the parties" in the materials before the President at the time of the President's decision, adding that "this issue relates only indirectly to the considerations identified by the President as dispositive in his decision." This action followed.

II. DISCUSSION

A. Subject Matter Jurisdiction

The court concludes that it is granted jurisdiction over the instant action by 28 U.S.C. § 1581(i). Under paragraphs (2)-(4) of subsection (i) of § 1581, this Court has exclusive jurisdiction of civil actions commenced against the United States, its agencies, or its officers that arise out of any law of the United States providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue" [paragraph (2)], "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety" [paragraph (3)], or "administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection...." [Paragraph (4)].

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Section 421 provides for increased tariffs for reasons other than raising revenue, specifically, for preventing or remedying market disruption adversely affecting a domestic industry. It also authorizes quantitative import restrictions to serve these same purposes, which are reasons "other than the protection of the public health or safety." Plaintiff has commenced an action against the President of the United States and the U.S. Trade Representative, both of whom are officers of the United States. With respect to the President, status as an officer of the United States stems from the Constitution itself, for the President is the essential constitutional officer under Article II of the Constitution. "The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years. . . ." U.S. CONST., Art. II, § 1. "This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Nixon v. Fitzgerald,* 457 U.S. 731, 750, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982). The court concludes, therefore, that this action falls squarely within the express terms of the jurisdictional provisions in § 1581(i)(2) and (i)(3).

Defendants move to dismiss this action for lack of subject matter jurisdiction, advancing an argument based on two contentions. Defendants contend, first, that the President must be dismissed from this action, relying on the recent decision of the United States Court of Appeals for the Federal Circuit in *Corus Group PLC v. Int'l Trade Comm'n.* 352 F.3d 1351 (Fed.Cir.2003). Specifically, defendants interpret *Corus Group* to require that a challenge such as this to a presidential

decision be dismissed for lack of subject matter jurisdiction because of the Federal Circuit's statement in *Corus Group* that "section 1581(i) does not authorize proceedings directly against the President." *Id.*, 352 F.3d at 1359. The second contention by defendants is that this case may not proceed as a challenge to an action of the U.S. Trade Representative, who in the statutory Section 421 procedure performs the role of advising the President regarding import relief. Defendants argue that this Court, lacking "jurisdiction to entertain plaintiff's claims against the President, likewise lacks jurisdiction to entertain challenges to the President's advisors." *Defs.' Mot. to Dismiss* at 3. According to their argument, the U.S. Trade Representative's recommendation to the President addressing the issue of import relief is purely advisory, rather than determinative of legal rights, and hence it is unreviewable under principles announced by the Supreme Court in *Bennett v. Spear,* 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997), and cited by the Federal Circuit in *Corus Group.* Having contended that this action may be brought neither against the President nor against the U.S. Trade Representative, defendants conclude that this court must dismiss this case for lack of subject matter jurisdiction.

The court disagrees with defendants' jurisdictional analysis for two reasons. First, if this court were to construe the Federal Circuit's decision in *Corus Group* to require dismissal of this action, it would be acting contrary to the jurisdictional principles applied by the Federal Circuit in a line of cases in which presidential action was challenged directly, including *Humane Society of the United States v. Clinton,* 236 F.3d 1320 (Fed.Cir.2001), a decision not

overturned by *Corus Group*. *See Corus Group*, 352 F.3d at 1359-1360. Second, were the court to accept defendants' reasoning, it would be holding, in the particular posture of this case, that decisions by the President to deny import relief pursuant to authority delegated by Congress in Section 421 are entirely outside the scope of judicial review under 28 U.S.C § 1581(i). Such a holding, which would go beyond the holding in *Corus Group*, cannot be reconciled with the express language of § 1581(i). These two points are discussed below.

In *Corus Group*, the Court of Appeals for the Federal Circuit concluded that the Court of International Trade should have dismissed the President from an action brought under 28 U.S.C. § 1581(i) challenging certain decisions made during an "escape clause" proceeding affecting steel imports that was conducted under section 201 of the Trade Act of 1974. The Court of Appeals reasoned that § 1581(i) does not authorize proceedings directly against the President, observing that it "refers only to actions 'against the United States, its agencies, or its officers' and does not specifically include the President." 352 F.3d at 1359. The Court of Appeals in *Corus Group* held that the Court of International Trade nevertheless had jurisdiction over the subject matter of the dispute under 28 U.S.C. § 1581(i) and concluded that relief still could have been sought against the Commissioner of Customs, who along with the President and the U.S. International Trade Commission was named as a defendant. The Court of Appeals observed that had plaintiffs prevailed, the Customs Commissioner could have been enjoined from collecting duties, as proclaimed by the President under the escape clause, on the imported tin mill steel products that were at issue in the case. *Id.*

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In *Humane Society of the United States v. Clinton,* as in *Corus Group,* plaintiffs sought relief against, and named as defendants, the President of the United States and other government officials (in that case, the Secretaries of State and Commerce). The plaintiffs in *Humane Society* sued the government officials for their alleged failure to comply with the Driftnet Fishing Act, 16 U.S.C. § § 1826-1826g. *See Humane Society,* 236 F.3d at 1323. Specifically, plaintiffs appealed from a decision of this Court refusing to issue a writ of mandamus ordering the President to impose sanctions on Italy for large-scale driftnet fishing and refusing to find arbitrary and capricious a certification by the Secretary of Commerce that large-scale driftnet fishing during a specified time period had been terminated by Italy. *See id.* Plaintiffs had brought their case in this Court under 28 U.S.C. § 1581(i).

The defendants in *Humane Society* sought dismissal on the ground that "there has been no waiver of sovereign immunity by the United States." 236 F.3d at 1325. The Court of Appeals for the Federal Circuit, observing that "[s]overeign immunity and subject matter jurisdiction are related but different juridical concepts," *id.* at 1326, further observed that "[u]nless the grant of jurisdiction carries with it a coextensive waiver of sovereign immunity, the Congressional grant would be a hollow act, with no significant consequences to the sovereign, and no significant benefits to the sovereign's subjects." *Id.* at 1328. Analogizing to the Supreme Court's analysis of jurisdiction and waiver of sovereign immunity under the Tucker Act in *United States v. Mitchell,* 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983), the Federal Circuit concluded in *Humane Society* that 28 U.S.C. § 1581 "not only states the jurisdictional grant to

the Court of International Trade, but also provides a waiver of sovereign immunity over the specified class of cases." 236 F.3d at 1328. The Court of Appeals further concluded in *Humane Society* that "[t]he Court of International Trade properly exercised jurisdiction over this case." *Id.*

With respect to the scope of the jurisdictional grant in 28 U.S.C. § 1581(i), the decision of the Court of Appeals in *Humane Society* was consistent with a line of previous decisions in which challenges to presidential action pursuant to tariff statutes were brought thereunder. In its opinion in *Humane Society,* the Court of Appeals noted with approval the plaintiffs' citation of "numerous cases in which the Court of International Trade has since considered challenges to the actions of the President pursuant to the grant of jurisdiction in § 1581(i). *See, e.g., Florsheim Shoe Co. v. United States,* 744 F.2d 787 (Fed.Cir.1984); *United States Cane Sugar Refiners' Ass'n v. Block,* 69 C.C.P.A. 172, 683 F.2d 399 (1982); *Kemet Electronics Corp. v. Barshefsky,* 976 F.Supp. 1012 (CIT 1997); *Luggage & Leather Goods Mfrs. of America, Inc. v. United States,* 588 F.Supp. 1413 (CIT 1984)." 236 F.3d at 1327. This court cannot adopt the interpretation of *Corus Group* advanced by defendants and, at the same time, adhere to the jurisdictional principles set forth in *Humane Society* and the predecessor cases in which presidential actions were challenged pursuant to 28 U.S.C. § 1581(i). Nor is this court able to reconcile the construction of § 1581(i) advanced by defendants with the plain meaning of that statutory provision.

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As noted above, *Corus Group* did not overturn *Humane Society. See Corus Group,* 352 F.3d at 1359-1360. Furthermore, it did not overturn the previous cases identified in *Humane Society* as "numerous cases in which the Court of International Trade has since considered challenges to the actions of the President pursuant to the grant of jurisdiction in § 1581(i)." *Humane Society,* 236 F.3d at 1327. Moreover, under precedent of the Court of Appeals for the Federal Circuit, these earlier decisions may be overturned only *en banc. See Sacco v. Dep't of Justice,* 317 F.3d 1384, 1386 (Fed.Cir.2003) (*citing Newell Companies, Inc. v. Kenney Mfg. Co.,* 864 F.2d 757, 765 (Fed.Cir.1988) ("A panel of this court is bound by prior precedential decisions unless and until overturned *en banc.*")). To the extent of any conflict between the decision in *Corus Group* and the decision in *Humane Society,* this court concludes that it should follow the earlier decision, because a decision of one panel of the Court of Appeals for the Federal Circuit should not be read to overturn the decision of a previous panel. "Where there is a direct conflict, the precedential decision is the first." *Newell Companies, Inc.,* 864 F.2d at 765 (Fed.Cir.1988).

The second part of defendants' argument on jurisdiction is that the recommendation of the U.S. Trade Representative in the administrative proceeding was purely advisory, rather than determinative of legal rights, and hence is unreviewable under principles announced by the Supreme Court in *Bennett v. Spear,* 520 U.S. at 177-78, 117 S.Ct. 1154, and cited by the Federal Circuit in *Corus Group.* Having contended that this court lacks subject matter jurisdiction over an action brought directly against the President and that the Trade Representative's action cannot be challenged, defendants

present what is in effect an argument that this Court lacks subject matter jurisdiction because there is no officer of the United States against whom relief may be sought. The court finds this argument unpersuasive.

As confirmed by the jurisdictional analyses in *Humane Society* and in prior decisions involving challenges to presidential action under trade statutes, 28 U.S.C. § 1581(i) provides subject matter jurisdiction in this Court over a challenge such as this to final presidential action taken under Section 421. Accordingly, the court need not reach the issue whether the Trade Representative's recommendation to the President, standing by itself, would have been appealable in this forum as a final decision, or, alternatively, "purely advisory" under principles advanced in *Bennett v. Spear. See Bennett v. Spear,* 520 U.S. at 178, 117 S.Ct. 1154. The procedural actions taken by the Office of the U.S. Trade Representative are challenged in this proceeding. They are reviewable pursuant to the subject matter jurisdiction of this Court as procedural predicates to the final presidential action. *See Dalton v. Specter,* 511 U.S. 462, 478, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994) (Blackmun, J., concurring in part and concurring in the judgment); *see also Fed. Trade Comm'n v. Standard Oil of Calif.,* 449 U.S. 232, 244-245, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980) (Preliminary decision to issue complaint by Federal Trade Commission is not insulated by finality requirement, and "a court of appeals reviewing a [final] cease-and-desist order has the power to review alleged unlawfulness in the [preliminary] issuance of the complaint.").

Furthermore, were this court to accept the two premises of defendants' jurisdictional argument, subject matter jurisdiction would be found to exist in this Court where a challenge is brought to a presidential decision granting import relief under Section 421 but not where the challenge is brought against a presidential decision denying such relief. Where the action challenged is one in which the President granted import relief, the Commissioner of Customs could be enjoined from collecting duties or from excluding merchandise from entry. Where, as here, the President denied such relief, defendants' construction of § 1581(i) would leave no officer of the United States who could be sued. Support for such an anomalous distinction can be found neither in the language of 28 U.S.C. § 1581(i) nor in the congressional purpose underlying this jurisdictional provision. The jurisdictional bifurcation that would be created by defendants' interpretation of § 1581(i) would appear to blur the distinctions between subject matter jurisdiction and personal jurisdiction. It also would lead to confusion of the type Congress intended to prevent when it included 28 U.S.C. § 1581(i) as part of the Customs Courts Act of 1980, Pub. L. 96-417. As the Court of Appeals for the Federal Circuit observed in *American Association of Exporters and Importers-Textile and Apparel Group v. United States,* 751 F.2d 1239, 1245-46 (Fed.Cir.1985), that intent was "to establish clear rules and to center international trade litigation in the CIT."

For the foregoing reasons, this court rejects the interpretations of § 1581(i) and of *Corus Group* that are advanced by defendants. Defendants' motion to dismiss for lack of subject matter jurisdiction is denied.

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B. Summary Judgment and Judgment on an Agency Record

In seeking dismissal of this action, defendants have moved for judgment on an agency record pursuant to USCIT Rule 56.1, "Judgment Upon an Agency Record for an Action Other Than That Described in 28 U.S.C. § 1581(c)." Subsection (a) of that Rule provides, in pertinent part, that "where a party believes that the determination of the court is to be made solely upon the basis of the record made before an agency, that party may move for judgment in its favor upon all or any part of the agency determination." In this action, however, the determination of the court cannot be made solely on the basis of the record made before an agency, because the decision under review is that of the President, not that of an administrative agency. For the same reason, this case cannot be decided on the basis of judgment "upon all or any part of the agency determination." Therefore, the subject matter of Rule 56.1 does not precisely describe the issue pending before the court.

This case presents no genuine issue as to any material fact. Both plaintiff and defendants are seeking judgment as a matter of law. Specifically, plaintiff Motion Systems seeks an order granting it judgment on the record setting aside the President's determination not to grant relief from imports. Defendants and defendant-intervenor CCL Industrial Motor Ltd. seek judgment as a matter of law dismissing this action. These circumstances are within the ambit of Rule 56, Summary Judgment.[5] Accordingly, the court will consider defendants' motion as a motion for summary judgment under

5. USCIT R. 56(c) states, in the relevant part:

(Cont'd)

USCIT Rule 56 and, similarly, treat the submission of plaintiff opposing defendants' motion as a cross motion for summary judgment.[6]

C. Standard of Review for Presidential Actions under Trade Statutes

In reviewing final actions of the President, courts have applied a standard of review considerably narrower and more deferential than the standards most often accorded to final actions by administrative agencies, which Congress has

(Cont'd)

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

6. At oral argument held October 22, 2003, the parties indicated that they do not oppose the court's consideration of the relief sought by defendants and plaintiff as a motion and cross motion, respectively, for summary judgment under Rule 56. *Oral Arg. Tr.* at 64—66. Subsequent to oral argument, plaintiff filed with the court a letter, dated November 18, 2003, stating that plaintiff now considered summary judgment to be inappropriate and seeking to "withdraw any concession that consideration under Rule 56 is in order." In its opposition to defendants' motion under Rule 56.1, plaintiff had acknowledged that "[t]here are no material issues of fact in issue in this action" and sought judgment on the record in its favor. Plaintiff has not sought to amend its pleadings. Most significantly, plaintiff's letter of November 18, 2003 does not establish that this case presents a genuine issue as to any material fact. Under these circumstances, Rule 56 is the applicable rule under which this case is to be decided.

subjected generally to standards of review prescribed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The APA provisions include the standard of review commonly referred to as the "arbitrary and capricious" or "abuse of discretion" standard, under which a court will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

For cases brought under 28 U.S.C. § 1581(i), 28 U.S.C. § 2640 refers this court to the APA, providing that the court "shall review the matter as provided in section 706 of title 5." However, 5 U.S.C. § 706 is expressly confined to the review of an "agency action." As the Supreme Court recognized in *Franklin v. Massachusetts*, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), "the President is not an agency within the meaning of the Act," concluding in that instance that "there is no final agency action that may be reviewed under the APA standards." *Id.* at 796, 112 S.Ct. 2767. The *Franklin* Court reasoned as follows:

> The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

505 U.S. at 800-801, 112 S.Ct. 2767. "Although the President's actions may still be reviewed for constitutionality, we hold that they are not reviewable for abuse of discretion under the APA. . . ." *Id.* at 801, 112 S.Ct. 2767 (citations omitted).

Franklin v. Massachusetts involved a judicial challenge to presidential action under the statutory congressional reapportionment provisions. When reviewing presidential actions taken under the authority of tariff statutes, courts also have limited the scope of their reviews, noting in particular the relationship between actions taken under tariff statutes and the President's unique role in foreign affairs. In *Maple Leaf Fish Co. v. United States,* 762 F.2d 86 (Fed.Cir.1985), the Court of Appeals for the Federal Circuit stated as follows:

> In international trade controversies of this highly discretionary kind-involving the President and foreign affairs-this court and its predecessors have often reiterated the very limited role of reviewing courts. *See, e.g., American Association of Exporters and Importers v. United States,* 751 F.2d 1239, 1248-49 (Fed.Cir.1985); *Florsheim Shoe Co. v. United States,* 744 F.2d 787, 793 795-97 (Fed.Cir.1984). For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.

762 F.2d at 89. *Maple Leaf Fish Co.* involved the review of presidential action under the "escape clause" established by section 201 of the Trade Act of 1974, 19 U.S.C. § § 2251-

53. In *Florsheim Shoe Co.*, the Federal Circuit applied essentially the same standard of review in considering a challenge to the President's exercise of authority under the Generalized System of Preferences ("GSP") program (specifically, Section 504 of Title V of the Trade Act of 1974, 19 U.S.C. § 2464) to limit duty-free tariff treatment for a certain class of imported goods. The Federal Circuit in *Florsheim Shoe Co.* concluded that "[b]oth the Supreme Court and Court of Customs and Patent Appeals precedent have established that the Executive's decisions in the sphere of international trade are reviewable only to determine whether the President's action falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conforms with the relevant procedural requirements." *Florsheim Shoe Co. v. United States,* 744 F.2d 787, 795 (1984). The court further concluded that "[t]he President's findings of fact and the motivations for his action are not subject to review." *Id.* (citing *United States v. George S. Bush & Co.*, 310 U.S. 371, 379-80, 60 S.Ct. 944, 84 L.Ed. 1259 (1940); *United States Cane Sugar Refiners' Association v. Block,* 683 F.2d at 404; *Aimcee Wholesale Corp. v. United States,* 60 C.C.P.A. 1, 468 F.2d 202, 206 (1972)).

As do the trade enactments at issue in *Maple Leaf Fish Co., supra,* and *Florsheim Shoe Co., supra,* Section 421 grants the President considerable discretion. The President may decide to provide import relief to the domestic industry, or, after making certain findings, may decide not to do so. If he decides to provide such relief, he may do so by means of "increased duties or other import restrictions." Section 421(a), 19 U.S.C. § 2451(a). The time period for the relief is

also left to the President's discretion; the relief is to remain in effect "for such period as the President considers necessary to prevent or remedy the market disruption." *Id.*

Section 421 does not indicate congressional intent to subject the President's determinations thereunder to an APA "abuse of discretion" or similar standard. Therefore, in reviewing the President's determination of January 17, 2003 not to proclaim restrictive measures on imports of pedestal actuators from China, this court will uphold the President's action absent "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89.

D. Analysis of the President's Decision under the Applicable Standard of Review

1. Construction of the Governing Statute and Action Within Delegated Authority

This court finds no basis to conclude that the January 17, 2003 decision not to grant import relief to the U.S. pedestal actuator industry is based on a misconstruction of Section 421. The decision is consistent with the statute with respect to the types of factual determinations that are required to support a denial of import relief to a domestic industry and with respect to the requirement that the published decision include the "reasons therefor." Moreover, because it contains a specific determination and a specific finding responsive to the statutory criteria for denying relief and presents reasons that are sufficient under the applicable standard for judicial review, the President's decision did not exceed the authority delegated by Congress in Section 421.

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The aforementioned statutory criteria are set forth in Section 421(k). Section 421(k)(1) requires that a decision denying import relief be based on a presidential determination that provision of relief is "not in the national economic interest of the United States, or, in extraordinary cases, that the taking of action pursuant to subsection (a) of this section would cause serious harm to the national security of the United States." 19 U.S.C. § 2451(k)(1). If the President decides to deny relief under the "economic interest" criterion as opposed to the "national security" criterion, the President may do so only upon a presidential finding under Section 421(k)(2) that "the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action." 19 U.S.C. § 2451(k)(2).

The President's January 17, 2003 decision contains a presidential determination under the economic interest criterion: "After considering all relevant aspects of the investigation, I have determined that providing import relief for the U.S. pedestal actuator industry is not in the national economic interest of the United States." The decision also contains a presidential finding that "the import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action." Finally, with respect to the President's decision to deny relief, the notice states "reasons therefor."

This court's consideration of the reasons stated in the presidential decision must be informed by the degree of deference to be accorded to the President under the applicable standard of review. As discussed previously, "[t]he President's findings of fact and the motivations for his action

are not subject to review." *Florsheim Shoe Co. v. United States,* 744 F.2d at 795. Although the President must state reasons for his decision, those reasons are not to be reviewed in this court under the "abuse of discretion" standard of 5 U.S.C. § 706(2)(A), nor are the underlying findings of fact to be subjected to a standard such as the "substantial evidence" standard described in 5 U.S.C. § 706(2)(E).

The reasons set forth in the President's notice refer to factual matters that were before the President as a result of the investigation conducted by the USITC. They relate specifically to the statutory "economic interest" criterion and the statutory requirement that denial of relief under that criterion be based on a presidential finding that "the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action." As a result, they are directed to the specific determination and finding which, under the plain meaning of Section 421(k), must guide the exercise of presidential discretion to deny relief. Having made both the "economic interest" determination required by subsection (k)(1) and the finding under subsection (k)(2) that imposing import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action, and having presented reasons for his decision in the published notice that are sufficient under the applicable standard for judicial review, the President was acting within the boundaries of the discretion Congress delegated to him in deciding not to impose import relief for the domestic pedestal actuator industry.

Motion Systems contends that the President, in denying import relief following the affirmative determination of market disruption by the USITC, both misconstrued Section 421 and exceeded his authority thereunder. Once the USITC has made such a determination, plaintiff argues, the President "is acting under a mandate to provide relief," unless the President invokes what plaintiff views "is meant to be a rare exception to that relief." *Pl.'s Br. in Supp. of its Opp. to Defs.' Mot. for Summ. J. upon an Agency R.* (*"Pl.'s Br."*) at 28. In plaintiff's view, the statute creates a presumption of relief in the use of the words "shall . . . proclaim" in subsection (a) of Section 421, under which the President, following an affirmative USITC determination, "shall, in accordance with the provisions of this section, proclaim increased duties or other import restrictions." *Pl.'s Br.* at 24. Motion Systems finds further support for its interpretation in the language of subsection (j)(2) of Section 421, which provides that the President, in the absence of an agreement with the People's Republic of China, "shall provide import relief in accordance with subsection (a) of this section." *Id.*

In asserting that the provision in subsection (k)(2) of Section 421 "is meant to be a rare exception" to relief, Motion Systems places emphasis on the words "clearly greater" as used therein ("The President may determine under paragraph (1) that providing import relief is not in the national economic interest of the United States only if the President finds that the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action"). Based on the words "clearly greater" as used in subsection (k)(2), plaintiff construes the statute to require that "[i]n order to support a denial of relief . . . the

evidence supporting the denial must be 'clear,' or beyond a reasonable doubt" and that "the burden was on the President to make such a negative determination only where such more-than-substantial evidence was produced." *Pl.'s Br.* at 3. Plaintiff further contends that "[t]he record must contain evidence quantifying the adverse economic impact on the United States economy of providing such relief, not mere conjecture that there might be some adverse impact." *Id.* Regarding benefits of relief, plaintiff argues that "[t]he President has simply not examined or quantified the benefits of relief, and thus the Court cannot sustain his determination that the adverse impact on the United States economy of providing the recommended import relief would be greater than those benefits." *Pl.'s Br.* at 46.

The court does not agree with plaintiff's construction of Section 421. Subsection (k)(2) describes the nature of the presidential finding that must precede a presidential determination that providing import relief is not in the national economic interest. It does not impose on the President a burden to establish or support that finding with "evidence quantifying the adverse economic impact," "evidence beyond a reasonable doubt," "clear and convincing evidence," or "more-than-substantial evidence." The provision itself makes no reference to evidence or burden of proof. Nor does it indicate congressional intent to impose a standard of review different from that which the courts consistently have applied in the judicial review of presidential action under tariff statutes.

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The use of the words "shall . . . proclaim" and "shall provide" in subsections (a) and (j)(2) of Section 421, respectively, when read together with subsection (k)(2), do not impose on the President the evidentiary requirements that plaintiff ascribes to these statutory provisions. The words "shall . . . proclaim increased import duties or other restrictions," as used in subsection (a), are expressly qualified with the phrase "in accordance with the provisions of this section," which includes the exceptions provided for in subsections (k)(1) and (k)(2). Similarly, the "shall provide" language of subsection (j)(2) incorporates the same exceptions through the use of the phrase "in accordance with subsection (a) of this section."

A judicial inquiry commensurate with plaintiff's construction of the statute would require this court to evaluate the sufficiency of the evidence underlying the President's findings. That is not within the court's power. Again, "[t]he President's findings of fact and the motivations for his action are not subject to review." *Florsheim Shoe Co.*, 744 F.2d at 795.

Plaintiff relies on a number of cases for its contention that the President's findings should be subjected upon judicial review to a "clear and convincing" evidentiary standard. The cited cases include *Finnigan Corp. v. Int'l Trade Comm'n.*, 180 F.3d 1354, 1366 n. 8 (1999) (The applicable standard for determining existence of invalidating activities in a patent case is "clear, satisfactory and beyond a reasonable doubt," which is "indistinguishable from the more modern parlance of 'clear and convincing' evidence."); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.

Ed. 746 (1948) (Appellate review of a trial court's findings of fact will be affirmed unless "clearly erroneous."); *Connor v. United States*, 24 CIT 195, 198 (2000) (To establish jurisdiction under 28 U.S.C. § 1581(h) plaintiff must show by clear and convincing evidence that the immediate threat of a harm occurring exists.). The cases cited by plaintiff are unavailing. None establishes a rule of law under which this court, based on the effect of statutory words such as "clearly greater" or any words to similar effect, is to subject presidential findings to a substantial evidence test or a more stringent test requiring "clear and convincing" evidence or evidence "beyond a reasonable doubt."

In summary, the President's decision of January 17, 2003 contains the determination and the finding required by Section 421 to support a denial of import relief and presents "reasons therefor" that are sufficient to support that decision under the applicable standard for judicial review. The court finds no basis to conclude that the President's decision is based on "a clear misconstruction of the governing statute" or that it constituted "action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89.

2. Compliance with Procedures

The President's decision not to impose import relief for the pedestal actuator industry is subject to review by this court to determine "whether the President's action conforms with the relevant procedural requirements." *Florsheim Shoe Co.*, 744 F.2d at 795. As to review of procedure, the Court of Appeals for the Federal Circuit stated in *Maple Leaf Fish Co.* that "[f]or a court to interpose, there has to be . . . a significant procedural violation." 762 F.2d at 89. The court finds no such violation.

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The Section 421 proceeding involved an affirmative finding by the USITC of market disruption and a proposed remedy by the USITC, pursuant to Section 421(g). If the U.S. Trade Representative proposes a measure to prevent or remedy the market disruption found by the USITC to exist, the Trade Representative is required by Section 421(h) to publish notice of that measure in the Federal Register and "of the opportunity, including a public hearing, if requested, for importers, exporters, and other interested parties to submit their views and evidence on the appropriateness of the proposed measure and whether it would be in the public interest." 19 U.S.C. § 2451(h)(1). In this proceeding, the Trade Representative's notice proposes the remedy recommended by the USITC "for further consideration by domestic producers, importers, exporters, and other interested parties, and invites any of these parties to submit their views and evidence on the appropriateness of the proposed remedy and whether it would be in the public interest." *USTR Notice,* 67 Fed. Reg. at 71,008.[7] At the request of Motion Systems, the U.S. Trade Representative conducted a public hearing, which was held on December 18, 2002. Thus, the Trade Representative's procedures satisfied the basic procedural requirements of the statute for public notice and comment and for a public hearing.

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7. The notice also requested public comment "on other possible actions, including: imposition of a quota on imports of pedestal actuators from China, with a quantity and/or duration different from the USITC recommendation; imposition of a tariff-rate quota on imports of pedestal actuators from China; increased duties on imports of pedestal actuators from China; an import monitoring mechanism; or no import relief (pursuant to a determination under Section 421(k) of the Trade Act regarding the national economic interest or national security)." *USTR Notice,* 67 Fed. Reg. at 71,008.

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Motion Systems raises two objections to the Trade Representative's conduct of the hearing. First, Motion Systems asserts that the hearing procedures were not strict enough to prevent Electric Mobility Corporation from placing on the record "views," rather than "hard evidence," which views Motion Systems asserts would have been exposed as false if subjected to "cross-examination." *Pl.'s Br.* at 52-53. Plaintiff contends that the less-than-formal procedures allowed Electric Mobility to place on the record statements indicating that Electric Mobility's switch to a Chinese supplier of actuators had reduced the price of that company's scooters. In testimony at the Trade Representative's hearing, the president of Electric Mobility, Mr. Michael Flowers, stated that when Electric Mobility switched its sourcing of pedestal actuators from Motion Systems to the Chinese supplier it reduced the price of its Rascal Scooter by over $300. A.R. Ex. IV at 7-8. Mr. Flowers followed that statement with the statement that he "believe[d] the import quotas recommended will increase our average sale price by at least $200 next year. . . ." *Id.* at 8.

Motion Systems, in a post-hearing submission, challenged the credibility of Mr. Flowers's testimony on several points. A.R. Ex. V, Comment 29. On the specific issue of price, Motion Systems claimed that Electric Mobility had not reduced its scooter prices after the change to the Chinese supplier. *Id.* Motions Systems placed two documents on the record to support its claim. The first document is a transcript of a hearing from a different federal court proceeding in which another company official of Electric Mobility, Mr. George Flowers, stated that the company had not sought out a cheaper supplier for the purpose of passing along savings

to consumers. *Id.* The second document is an article by an unidentified author that is described as having appeared on the website www.geocities.com/stuportner/files/news.htm with the headline "Electric Mobility To No Longer Sell Through Dealers." The article states that "by going direct, Electric Mobility can sell its popular Rascal scooter for $4,000- $5,000, compared to the roughly $2,900 dealers sell them for, sources say." *Id.* Motion Systems, before this court, claims that by allowing Mr. Flowers to place on the record "unsubstantiated" testimony, not based on "hard evidence" and contradicted by documents on the record, the process allowed incorrect statements on the record, without which the President's findings cannot be affirmed. Motion Systems reasons that Electric Mobility's alleged failure to lower the price in the absence of import quotas undermines the contention that imposing import quotas will result in increased prices.

The second procedural violation plaintiff claims is that the advance "notice" Electric Mobility gave of its intended presentation at the hearing was misleading. The Federal Register notice of the hearing had requested that parties intending to appear provide "a brief summary of the comments to be presented." *USTR Notice,* 67 Fed. Reg. at 71,008. Electric Mobility filed a letter stating that its president, Michael Flowers, would testify. It summarized Mr. Flowers's comments as follows:

> Mr. Flowers will testify that Electric Mobility is the only purchaser of the actuators at issue, and that, no matter what remedy is imposed, Electric Mobility will not resume purchases from Motion

> Systems. He will also testify that the imposition of import restrictions would harm the domestic economy and cause additional burdens to the elderly and mobility-impaired.

A.R. Ex. III, Patton Boggs letter, Dec. 11, 2002. Motion Systems claims that Mr. Flowers's discussion at the hearing of the probability of increased prices for mobility scooters if the proposed import relief were granted was outside the scope of the summary and, therefore, improperly before the U.S. Trade Representative. *See Pl.'s Br.* at 54-55.

Plaintiff's first procedural objection is not a sufficient basis upon which this court may overturn or otherwise disturb the presidential decision. The Trade Representative's procedures afforded interested parties the opportunity to be heard in the precise manner required by Section 421(h). Although Motion Systems may have desired a more trial-like hearing with sworn testimony and cross-examination, nothing in the statute required such procedures.

So long as it satisfies the specific statutory requirements and adheres to "fundamentals of fair play," an agency has considerable latitude over its method of inquiry. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143-144, 60 S.Ct. 437, 84 L.Ed. 656 (1940). The Supreme Court has expressed this principle as follows:

> But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of

> procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"

Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 543-544, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (quoting *FCC v. Schreiber,* 381 U.S. 279, 290, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965), in turn quoting from *FCC v. Pottsville Broad. Co.,* 309 U.S. at 143, 60 S.Ct. 437). In this case, the Trade Representative's procedures allowed witnesses to make extensive statements at a public hearing and allowed participating parties to submit supporting material. The President was free to consider the statements submitted, weigh their credibility, and ignore irrelevant submissions. Motion Systems was afforded the opportunity in a post-hearing submission to respond to the entire case made by the importer, the Chinese manufacturer, and the Chinese government. Its objections to the placing of the "views" of Electric Mobility on the record and to its lack of an opportunity to cross-examine Electric Mobility's witness do not establish, in the words of the opinion in *Maple Leaf Fish Co.,* a "significant procedural violation." 762 F.2d at 89.

Plaintiff's second claimed procedural error, that the "notice" given by Electric Mobility with regard to its presentation at the Trade Representative's hearing was misleading, also fails to suffice as a basis to invalidate the President's decision. Electric Mobility's pre-hearing summary indicated that Mr. Flowers would discuss harm to the domestic economy and "additional burdens" to consumers of the downstream products. Prices for the downstream

products are among the subjects relevant to the topic of "additional burdens" referred to in the pre-hearing letter filed by Electric Mobility. In addition, Motion Systems had the opportunity to make a post-hearing submission to the Trade Representative with the potential to cure the effect of any unfair surprise Motion Systems may have encountered because of the content of Mr. Flowers's testimony. Motion Systems in fact made a post-hearing comment submission in which it contested the validity of Mr. Flowers's statements about the price of the downstream products. A.R. Ex. V, Comment 29. That submission was part of the record available for the President's consideration.

With respect to both of its objections to the Trade Representative's hearing, plaintiff has not established a procedural irregularity that denied it fundamental fairness, nor is it able to show that it was harmed by the procedural errors it alleges. *See Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed.Cir.1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings.").

E. Other Challenges by Motion Systems to the President's Decision

In addition to its challenge to the President's construction of Section 421, its claim that the President exceeded his authority thereunder, and its objections to the Trade Representative's hearing procedure, Motion Systems raises two challenges to the President's decision and decision-making process, which the court summarizes as follows: (1) the President and the Trade Representative improperly

considered "political factors" after the close of the statutory U.S.-China consultation period; and (2) the President was required to reopen the proceeding after the submission of additional evidence by Motion Systems in rebuttal to information submitted by Electric Mobility.

1. The President Is Not Prohibited from Considering "Political Factors."

Plaintiff alleges that the President and the U.S. Trade Representative acted improperly in considering what it terms "political factors" after the conclusion of the period identified by Section 421(j)(1) for consultations with China. In support of its claim, Motion Systems points to a comment letter submitted to the Trade Representative by the Embassy of the People's Republic of China and testimony at the Trade Representative's hearing by an official of the People's Republic of China, each of which, according to plaintiff, "argued that proceeding under this provision [*i.e.*, Section 421] threatened 'harm to China-U.S. trade and economic relations.' " *Pl.'s Br.* at 50-51, 51 n. 34.

Plaintiff submits that consideration of such "political factors" was improper after the consultation period and that the President was then required to confine his consideration to "economic factors." Under Section 421(j)(1), "[t]he Trade Representative is authorized to enter into agreements for the People's Republic of China to take such action as necessary to prevent or remedy market disruption, and should seek to conclude such agreements before the expiration of the 60-day consultation period" provided for in the Protocol of Accession of the People's Republic of China to the World

Trade Organization. If no agreement is reached, or if the President "determines tha [t] an agreement reached . . . is not preventing or remedying the market disruption," then the President is directed to provide import relief in accordance with subsection (a) of Section 421. 19 U.S.C. § 2451(j)(2). Motion Systems argues that, subsequent to the consultation period, "[t]hreats of retaliation by China for application of the provisions of the law whose enactment it agreed to as a condition of support for Chinese accession to the WTO were improperly entertained and considered by USTR and the President." *Pl.'s Br.* at 50-51.

The court finds no merit in plaintiff's argument regarding "political factors." Neither the record before the court nor the text of the President's decision establishes that trade relations between the United States and China were a factor in the President's decision. Regardless, the court finds nothing in Section 421 that would have prohibited the President from considering a wide range of factors, including an effect on trade relations between the United States and China, in determining whether there would be an adverse impact on the U.S. economy clearly greater than the benefits of granting relief. Nor does the court perceive any violation of Section 421 in the actions of the Trade Representative that included the Embassy letter in the record and that allowed the testimony of the official of the People's Republic of China. In enacting Section 421, Congress gave no indication of an intent to interfere with the Executive Branch function of communicating with foreign governments.

2. The President Was Not Required to Reopen the Proceedings.

Motion Systems argues that "[w]here, as here, the President's decision is based on testimony that is itself erroneous . . . there is an obligation to re-consider that decision in light of the new information that has come to light," adding that "[o]therwise, the integrity of a section 421 proceeding, including in particular the President's decision on remedy, is compromised and justice is denied." *Pl.'s Br.* at 60. In its post-decision submission, plaintiff cited as the "new information" price lists from the Department of Veteran Affairs for Electric Mobility's scooters indicating that Electric Mobility did not decrease the prices of its downstream mobility scooters after it switched to the Chinese pedestal actuator supplier and that Electric Mobility did not make the "seat lift" standard equipment on 70 percent of its scooters. Plaintiff contends that these price lists establish that the testimony by Electric Mobility's president at the hearing conducted by the office of the U.S. Trade Representative was incorrect or misleading.

The matter raised in plaintiff's post-decision submission does not suffice as a basis upon which this court may compel the President or the Trade Representative to reopen the proceedings for reconsideration of the President's final decision. Plaintiff correctly observes that administrative bodies have the authority to reconsider their decisions based on a showing of perjury or fraud. *See Pl.'s Br.* at 58 (citing *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 650 F.2d 9 (2d Cir.1981)); *see also Elkem Metals Co. v. United States*, 193 F.Supp.2d 1314, 1320 (2002). However, the decision to

reconsider is one left to the agency in question. A court will not disturb the decision of the agency not to reconsider, except upon a showing of abuse of discretion. *See United States v. Pierce Auto Freight Lines,* 327 U.S. 515, 535, 66 S.Ct. 687, 90 L.Ed. 821 (1946). Even more deference likely would be due a decision not to reconsider a final action taken by the President.

Plaintiff has not made a showing that the President or the Trade Representative committed an abuse of discretion following issuance of the final presidential decision. In its post-decision submission, Motion Systems addressed a general subject that the party already had addressed in its post-hearing submission and that was not pivotal to the reasons underlying the President's decision as stated by the President in the Federal Register notice of January 22, 2003. Accordingly, the "new information" offered in the post-decision submission does not establish that the President's final decision was, as plaintiff alleges, *"based on* testimony that is itself erroneous." (Emphasis added). Nor does it present facts that would compel the President, in the exercise of his overall discretion as granted by Congress in Section 421, to reach a different decision.

The Assistant Trade Representative's letter following plaintiff's post-decision submission responded that the issue raised in that submission was neither novel nor determinative in the proceedings. The letter stated that "[t]he issue of whether Electric Mobility reduced its price after purchasing Chinese pedestal actuators was clearly reflected in [the materials submitted prior to the decision] as disputed between the parties." The letter concludes that the "issue relates only indirectly to the considerations identified by the President as dispositive in his decision."

For these reasons, the matters raised in plaintiff's post-decision submission are insufficient to form the basis upon which this court may compel a reopening of the administrative proceedings.

III. CONCLUSION

For the foregoing reasons, the court concludes that it has subject matter jurisdiction of this case under 28 U.S.C. § 1581(i) and that the President's decision denying import relief to the pedestal actuator industry did not misconstrue the governing statute and did not exceed the authority delegated to the President thereunder. The court finds no basis to overturn that decision on procedural grounds or to order the President or the U.S. Trade Representative to reopen the administrative proceedings. Summary judgment is granted for defendants and will be entered accordingly.

Dated: June 3, 2004
New York, New York

/s/ Timothy C. Stanceu
Timothy C. Satnceu
Judge

Supreme Court, U.S.
FILED
AUG 18 2006
OFFICE OF THE CLERK

No. 05-1443

In the Supreme Court of the United States

MOTION SYSTEMS CORPORATION, PETITIONER

v.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the President's determination, pursuant to statutory authority under 19 U.S.C. 2451(k)(1), not to impose restrictions on certain imports from the People's Republic of China because such restrictions are "not in the national economic interest of the United States" is subject to nonstatutory judicial review to determine whether the President had a sufficient basis for his decision.

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In the Supreme Court of the United States

No. 05-1443

MOTION SYSTEMS CORPORATION, PETITIONER

v.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 437 F.3d 1356. The opinion of the Court of International Trade (Pet. App. 45a-87a) is reported at 342 F. Supp. 2d 1247.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2006. The petition for a writ of certiorari was filed on May 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In connection with the accession of the People's Republic of China (PRC) to the World Trade Organiza-

tion, Congress added Section 421 to the Trade Act of 1974. See Act of Oct. 10, 2000, Pub. L. No. 106-286, § 103(a)(3), 114 Stat. 882 (codified at 19 U.S.C. 2451). That Section provides a safeguard mechanism applicable only to imports from the PRC. Section 421 allows the President to impose "increased duties or other import restrictions" in order to "prevent or remedy the market disruption" caused by products imported from the PRC. 19 U.S.C. 2451(a).

Section 421 directs the United States International Trade Commission (ITC) to conduct an "investigation to determine whether products of the People's Republic of China are being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products." 19 U.S.C. 2451(b). Proceedings before the ITC include publication of notice of the commencement of proceedings and public hearings, at which interested parties are permitted to present evidence, to comment upon any adjustment plan submitted, to respond to the presentations of other parties, and otherwise to be heard. 19 U.S.C. 2451(b)(5).

If the ITC renders an affirmative determination of market disruption, it is required to "propose the amount of increase in, or imposition of, any duty or other restrictions necessary to prevent or remedy the market disruption," 19 U.S.C. 2451(f), and to "submit a report to the President and the [United States] Trade Representative," 19 U.S.C. 2451(g)(1), detailing its market disruption determination and proposed remedy. The ITC's report must describe the effects of implementing its recommendation on "the petitioning domestic industry, on other domestic industries, and on consumers," as well as

the effects of not implementing the recommendation on the petitioning and other domestic industries, the petitioning industry's workers, and the communities where its facilities are located. 19 U.S.C. 2451(g)(2)(D).

Section 421 next directs the United States Trade Representative (USTR) to publish notice of any proposed remedy and of the opportunity, including a public hearing, if requested, for any interested party to submit comments regarding the appropriateness of the proposed measure and whether it would be in the public interest. 19 U.S.C. 2451(h)(1). At the same time, the USTR is instructed to consult with the PRC, pursuant to 19 U.S.C. 2451(j), about the possibility of reaching a mutual agreement to remedy the market disruption. If no bilateral agreement is reached, the USTR provides a "recommendation to the President concerning what action, if any, to take to prevent or remedy the market disruption." 19 U.S.C. 2451(h)(2).

After receiving the USTR's recommendation, "the President shall provide import relief * * * unless the President determines that provision of such relief is not in the national economic interest of the United States" or "would cause serious harm to the national security." 19 U.S.C. 2451(k)(1). In deciding whether to provide import relief, "the President may determine * * * that providing import relief is not in the national economic interest of the United States only if the President finds * * * adverse impact on the United States economy clearly greater than the benefits of such action." 19 U.S.C. 2451(k)(2). The statute does not provide for judicial review of the President's determination.

2. Petitioner is a domestic producer of pedestal actuators, which are component parts of electric scooters used by mobility-impaired people. Pet. App. 47a. Peti-

tioner filed a petition with the ITC seeking import relief pursuant to 19 U.S.C. 2451. The petition asserted that imports of pedestal actuators from the PRC were causing market disruption. In the Fall of 2002, the ITC, by a vote of three to two, issued an affirmative market disruption determination and proposed the imposition of quotas for a three-year period upon the importation of pedestal actuator imports from the PRC. *Pedestal Actuators from China*, USITC Pub. 3557, Inv. No. TA-421-1, at 1-2 & n.3 (Nov. 2002).

The USTR consulted with the PRC, pursuant to 19 U.S.C. 2451(j), but without reaching an agreement. Compl. ¶ 16. The USTR also accepted comments from interested parties and held a public hearing regarding possible remedies. *Id.* at ¶ 17. On January 2, 2003, the USTR submitted his recommendation to the President. *Id.* at ¶ 20.

On January 17, 2003, the President issued his determination that import restrictions should not be imposed on pedestal actuators from the PRC. *Presidential Determination on Pedestal Actuator Imports from the People's Republic of China* (Presidential Determination), 68 Fed. Reg. 3157. The President expressly found "that the import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action." *Ibid.* The President explained that he had concluded "that imposing the USITC's recommended quota would not likely benefit the domestic producing industry" because it would simply "cause imports to shift from China to other offshore sources." *Ibid.* Moreover, "[e]ven if the quota were to benefit the primary domestic producer, the cost of the quota to consumers, both the downstream purchasing industry and users of the downstream products, would substantially

outweigh any benefit to producers' income." *Ibid.* The President considered both the fact that there is a "significantly larger number of workers in the downstream purchasing industry [which might itself be forced to migrate production offshore] when compared with the domestic pedestal actuator industry," *ibid.*, and the fact that the burden of a quota would "negatively affect the many disabled and elderly" individuals who are the "ultimate consumers of pedestal actuators." *Id.* at 3158.

3. Petitioner filed suit in the Court of International Trade (CIT) asking the trial court to order the President to impose trade restrictions on pedestal actuators from the PRC. The government moved to dismiss on the ground that the CIT lacked jurisdiction to review the President's determination. Pet. App. 46a-47a.

The CIT denied the government's motion to dismiss, reasoning that it had jurisdiction pursuant to 28 U.S.C. 1581(i) to entertain direct actions against the President relating to trade matters. Pet. App. 56a-64a. The court sustained the Presidential Determination on the merits, however. Applying the three-pronged standard of review of Presidential actions described in *Maple Leaf Fish Co.* v. *United States*, 762 F.2d 86, 89, 90 (Fed. Cir. 1985), the CIT held that: (1) the President did not misconstrue the statute; (2) the President acted within his statutory authority; and (3) the President and the USTR adhered to the procedural requirements of Section 421. Pet. App. 69a-82a.

4. Petitioner appealed. After the case had been briefed and argued before a three-judge panel, the court of appeals ordered, sua sponte, that the appeal be heard en banc. *Motion Sys. Corp.* v. *Bush*, 140 Fed. Appx. 257 (Fed. Cir. 2005). After further briefing and reargument, the en banc court held, in a per curiam opinion joined by

ten of the twelve participating judges, that the CIT lacked jurisdiction over petitioner's challenge to the Presidential Determination. Pet. App. 1a-44a.

The court of appeals first held that there was no statutory basis for review of the President's decision. The CIT's jurisdictional statute, 28 U.S.C. 1581(i), permits judicial review of certain trade or tariff claims pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See *Shinyei Corp. of Am.* v. *United States*, 355 F.3d 1297 (Fed. Cir. 2004); 28 U.S.C. 2631(i) (suits pursuant to Section 1581(i) may be "commenced by any person adversely affected or aggrieved by agency action under section 702 of title 5"); 28 U.S.C. 2640 (in suits pursuant to Section 1581(i), the CIT "shall review the matter as provided in section 706 of title 5"). The court of appeals concluded that the President's determination was not subject to review pursuant to that statutory authority because the APA applies only to "agency action" and the President is not an "agency." Pet. App. 6a (citing *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992)).

The court of appeals further held that it could not exercise "nonstatutory" review over petitioner's challenge to the President's determination. Invoking this Court's decisions in *Dalton* v. *Specter*, 511 U.S. 462 (1994), *United States* v. *George S. Bush & Co.*, 310 U.S. 371 (1940), and *Dakota Central Telephone Co.* v. *South Dakota ex rel. Payne*, 250 U.S. 163 (1919), the court of appeals concluded that the President's exercise of his discretion under Section 421 to determine whether import relief is in the national economic interest is not subject to judicial review. Pet. App. 7a-12a. The USTR's actions were also not subject to review, the court held, because they "were not final, but only recommendations

for Presidential action." Pet. App. 12a-13a (citing *Franklin*, *505 U.S. at 798*).

Judge Gajarsa, joined by Judge Newman, concurred in the judgment. They would have held that the Presidential Determination was subject to review pursuant to the CIT's jurisdictional statute, 28 U.S.C. 1581(i). Pet. App. 20a-42a. On the merits, they would have affirmed the CIT's conclusion that petitioner had failed to establish either that the President misunderstood Section 421 or that he acted outside his delegated authority. *Id.* at 42a-43a.

ARGUMENT

Petitioner asks the Judicial Branch, pursuant to "nonstatutory judicial review" (Pet. 6), to overturn the President's decision not to impose trade barriers against certain imports from the PRC. Not surprisingly, petitioner can point to no case in which the courts have assumed so extraordinary a power without statutory authority. The court of appeals' conclusion that it lacked the power to review the President's exercise of his authority under Section 421 is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Significantly, petitioner does not urge before this Court the position of the concurring judges below. Whereas the two concurring judges believed that judicial review of the President's determination was within the jurisdiction of the CIT pursuant to 28 U.S.C. 1581(i), see Pet. App. 20a-42a, petitioner does not cite Section 1581(i) in the petition. Instead, petitioner urges the Court (Pet. 6) to grant certiorari to decide the question "whether nonstatutory judicial review" is available with

respect to the President's exercise of his discretion under Section 421.

Petitioner contends (Pet. 6-8) that review is necessary to resolve a conflict between the decision below and decisions of the District of Columbia Circuit. Contrary to petitioners' assertions, the court of appeals' decision does not conflict with either *Mountain States Legal Foundation* v. *Bush*, 306 F.3d 1132 (D.C. Cir. 2002), cert. denied, 540 U.S. 812 (2003), or *Chamber of Commerce of the United States* v. *Reich*, 74 F.3d 1322 (D.C. Cir. 1996). Even assuming that those decisions were correct, each made clear that the court was *not* faced with the question presented here.

In *Chamber of Commerce*, the D.C. Circuit found that it had authority to hear a suit to enjoin the Secretary of Labor from enforcing regulations he had adopted to implement an Executive Order, issued by the President pursuant to his authority under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 *et seq.*, barring federal agencies from contracting with employers that had hired permanent replacements for lawfully striking employees. 74 F.3d at 1324. In holding that the courts had authority to issue such relief, the D.C. Circuit distinguished this Court's decisions in *Dalton* v. *Specter*, 511 U.S. 462 (1994), and *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), each of which held that judicial review was unavailable with respect to certain Presidential determinations. The court of appeals observed that, in *Franklin*, "*only* the President's decision was called into question," 74 F.3d at 1329, and opined that the Court's hesitancy in *Dalton* "to review presidential action appears to be based on the special status of the President," *id.* at 1331 n.4. The court of appeals stressed that the plaintiff in *Chamber of Com-*

merce challenged the Secretary of Labor's implementation, through separate regulations, of the President's order. *Id.* at 1329; *id.* at 1331 n.4 ("here we are concerned with the long established non-statutory review of a claim directed at a subordinate executive official").

This case differs from *Chamber of Commerce* in precisely the same way that *Dalton* and *Franklin* did. Here, the roles of the ITC and USTR are merely to make nonfinal recommendations. Only the President may determine whether the provision of import relief "is not in the national economic interest of the United States" or "would cause serious harm to the national security." 19 U.S.C. 2451(k)(1). Moreover, when, as here, the President decides that he will *not* impose such measures, there is no implementation required of a subordinate executive official. Thus, unlike the plaintiff in *Chamber of Commerce*, petitioner seeks "to bring judicial power to bear directly on the President." 74 F.3d at 1331 n.4.

The D.C. Circuit's decision in *Mountain States* is likewise inapposite. The plaintiff there challenged Presidential Proclamations issued under the Antiquities Act of 1906, 16 U.S.C. 431 *et seq.*, which authorizes the President to designate as national monuments certain landmarks, structures, or objects of historic or scientific interest located on government land and to reserve the parcels of land on which the items are located. The plaintiff asked the court to undertake "factfinding * * * to ensure that substantial evidence existed to support the President's issuance of the Proclamations." 306 F.3d at 1134. After discussing decisions of this Court and the D.C. Circuit regarding the availability of nonstatutory review of Presidential action, *id.* at 1135-1136, the court of appeals ultimately concluded that the

case presented "no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority," because the complaint failed to allege facts to support the plaintiff's claim that the President had acted beyond his statutory authority. *Id.* at 1137. Plainly, then, there can be no conflict between the decision below and *Mountain States*, which reserved decision on the precise issue presented here.

Moreover, whereas both *Mountain States* and *Chamber of Commerce* involved purely domestic issues, the President's exercise of his authority under Section 421 implicates the Nation's foreign relations. It is evident from the face of the statute itself that Congress understood that the grant of import relief under Section 421 directly affects relations between this country and the PRC. For example, Section 421 specifically authorizes the President, through the USTR, to negotiate and enter into agreements with the PRC to prevent or remedy the market disruption found by the ITC. 19 U.S.C. 2451(j). Indeed, Congress specifically contemplated that the President might need to refuse import relief on the ground that it "would cause serious harm to the national security of the United States." 19 U.S.C. 2451(k)(1).

This Court's decisions confirm the unavailability of nonstatutory judicial review over the President's exercise of authority relating to foreign affairs. In an analogous case, *United States* v. *George S. Bush & Co.*, 310 U.S. 371 (1940), the Court held that it lacked authority to examine "the judgment of the President that the rates of duty recommended by the [Tariff] Commission are necessary to equalize the differences in the domestic and foreign costs of production." *Id.* at 379. The Court noted that "[n]o one has a legal right to the maintenance

of an existing rate or duty," *ibid.* (quoting *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 318 (1933)), and held that "the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review * * * than if Congress itself had exercised that judgment." *Id.* at 379-380. Similarly, in *Dakota Central Telephone Co.* v. *South Dakota ex rel. Payne*, 250 U.S. 163 (1919), the Court held that it was "beyond the reach of judicial power," *id.* at 184, to review the President's exercise of authority to seize telecommunications systems "whenever he shall deem it necessary for the national security or defense," *id.* at 181 (quoting J. Res. of July 16, 1918, ch. 154, 40 Stat. 904). See *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948) (President's decisions whether to approve or disapprove orders of the Civil Aeronautics Board are not reviewable because they "embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate"). For that reason as well, the decisions relied upon by petitioner are inapposite, and there is no conflict among the courts of appeals.

2. Petitioner also urges (Pet. 9) that review is necessary to clarify "whether *Dalton* repudiated all judicial review of allegedly ultra vires Presidential action." Contrary to petitioner's assertions, there is no evidence that the court of appeals failed to understand or apply faithfully this Court's holding in *Dalton*.

In *Dalton*, the Court distinguished "between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." 511 U.S. at 472. The Court noted its holding in *Franklin* that the "President's actions may * * * be reviewed for consti-

tutionality," *id.* at 469 (quoting *Franklin*, 505 U.S. at 801); *id.* at 473-474, but clarified that that exception does not encompass "every claim alleging that the President exceeded his statutory authority," *id.* at 474.

Although petitioner casts the issue presented here (Pet. 9) as one regarding the availability of "judicial review of allegedly ultra vires Presidential action," the court of appeals correctly concluded that petitioner makes "no colorable claim that the President exceeded his statutory authority." Pet. App. 9a. Section 421 specifically authorizes the President to withhold import relief if he determines that "the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action." 19 U.S.C. 2451(k)(2). The statute further directs that the President publish "reasons" for his determination. 19 U.S.C. 2451(*l*)(1). Here, it is clear that the President made the determination specified in the statute and published his reasons for so finding. See Pet. App. 52a-54a (summarizing and reproducing the President's decision and reasons).

Thus, as the court of appeals observed, petitioner's claim is not truly that the President acted without statutory authority, but that he made his determination "without evidentiary support," Pet. App. 9a, or, stated another way, "whether the President abused his discretion under section 421(k)," *id.* at 12a. See Pet. 4 ("The record provided no economic basis for the [President's] finding of an adverse impact on the United States economy clearly greater than the benefits of such action, * * * and neither court below examined the record to determine whether it supported the President's decision."); *id.* at 5 ("[t]he trial court decided not to review whether the record supported the decision to deny the

relief recommended by the ITC"). Even assuming, *arguendo*, as the Court did in *Dalton*, that "some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA," 511 U.S. at 474, it would not follow that the courts have authority to flyspeck the President's exercise of the precise discretion conferred on him by Congress, see *ibid.* ("where a claim 'concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power'") (quoting *Dakota Cent. Tel. Co.*, 250 U.S. at 184). Cf. *Mountain States*, 306 F.3d at 1134, 1137 (request for judicial review "to ensure that substantial evidence existed to support the President's issuance of [national monument] Proclamations" failed to state a claim "that the President acted beyond his authority under the Antiquities Act").

The court of appeals' application of this Court's holding in *Dalton* thus presents no occasion for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2006

Supreme Court, U.S.
FILED
AUG 29 2006
OFFICE OF THE CLERK

(3)

No. 05-1443

IN THE

Supreme Court of the United States

MOTION SYSTEMS CORPORATION,

Petitioner,

v.

GEORGE W. BUSH, President of the United States,
ROBERT B. ZOELLICK, United States Trade Representative,
and CCL INDUSTRIAL MOTOR, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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I.

A CLEAR SPLIT EXISTS BETWEEN THE FEDERAL CIRCUIT AND DISTRICT OF COLUMBIA CIRCUIT AS A RESULT OF *DALTON v. SPECTER*

A clear split exists between the D.C. and Federal Circuits concerning the scope of *Dalton v. Specter*, 511 U.S. 462 (1994), and respondents' trifling factual distinctions do not change that. Here, the President, pursuant to authority delegated by Congress under a statute which imposed limits on the grounds for his decision and required that it be made on a factual record, made an economic decision, not a foreign policy or national security decision.

First, the respondents cite no authority for the proposition that such a decision, which they concede would be reviewable if made by a subordinate Executive Branch official pursuant to similarly delegated authority, transforms itself into an unreviewable decision if the President makes it. Their attempt thus to distinguish *Chamber of Commerce v. Reich,* 74 F.3d 1322 (D.C. Cir. 1996), fails. (*See* Opp. 9.) Indeed, neither the Federal Circuit nor the D.C. Circuit has held that all Presidential decision making is inherently insulated from review as a result of the President's "special status" within the Executive Branch. Rather, the Federal Circuit, in the present case, recognized that Section 421 set limits on the President, but declined to review his denial of import relief on the ground that "judicial review is unavailable when a statute allegedly violated itself commits a decision to the discretion of the President" because the decision to deny import relief on domestic economic grounds was "sufficiently discretionary to preclude judicial review." *Motion Systems v. Bush*, 437 F.3d 1356, 1362 (Fed. Cir. 2006).

In sharp contrast, the D.C. Circuit in *Chamber of Commerce* held that *Dalton* operates much more narrowly,

finding that judicial review of the President's exercise of delegated authority is precluded only where the authorizing statute "*contains no limitations* on the President's exercise of that authority. . . ." *Chamber of Commerce*, 74 F.3d at 1331 (emphasis added). Under *Chamber of Commerce*, the Presidential Section 421 decision here would be reviewed much the same as that of an Administrative Law Judge who made a decision on economic facts.

The D.C. Circuit's decision in *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002), further highlights the conflict between the Federal and D.C. Circuits. In *Mountain States*, the D.C. Circuit reiterated that *Dalton* is inapposite "where the authorizing statute . . . places discernible limits on the President's discretion." *Id.* at 1136. This ruling unquestionably conflicts with the opinion below, which foreclosed all judicial review of petitioner's claims despite the explicit limitations on the President's ability to deny relief contained in Section 421(k)(2).

Contrary to respondents' assertion, *Mountain States* did not reserve "decision on the precise issue presented here" (Opp. 10) merely because the plaintiff in that case failed to allege facts sufficient to support its *ultra vires* claim. Significantly, the D.C. Circuit in *Mountain States* again recognized that Presidential decision making is subject to judicial review for compliance with statutory standards, but in that particular factual context stopped short of additional review of the lower court's fact finding after analyzing the plaintiff's claims and reviewing the challenged Presidential Proclamations. *Id.* at 1137. Further, unlike the plaintiff in *Mountain States*, petitioner here directed the attention of both the Court of Appeals and the trial court to the existence in the record of substantial evidence showing that the President's determination failed to comply with the fact

finding requirements of Section 421(k)(2). Accordingly, petitioner's claims are supported by more than "the bald assertion that the President acted outside the bounds of his constitutional and statutory authority." *Id.*

The split between the Federal Circuit and D.C. Circuit stems from divergent holdings about the *level* of discretion, if any, in delegated authority that will insulate Presidential action from judicial review. The conflict between the Circuits does not stem from the proposition that the *source* of the challenged executive action alters the outcome. Moreover, because respondents now contend that the fact that the President makes the decision renders that decision unreviewable, the need to grant a writ of certiorari is underscored. The proposition that the President, who can act only pursuant to authority that the Constitution either grants to him or which he receives from Congress and exercises in conformity with its delegation, cannot be reviewed when he acts pursuant to delegation, comprises a fundamental change in federal constitutional and administrative law.

Respondents next attempt to distinguish *Chamber of Commerce* and *Mountain States* on the ground that whereas those cases "involved only domestic issues, the President's exercise of his authority under Section 421 [supposedly] implicates the Nation's foreign relations." (*See* Opp. 10.) This feigned distinction lacks merit because the Presidential determination here under Section 421(k)(2) was based solely on domestic economic considerations. *See Presidential Determination on Pedestal Actuator Imports from the People's Republic of China* (Presidential Determination), 68 Fed. Reg. 3157 (2003). The President's stated reasons for denying the import relief had nothing to do with foreign affairs or national security, two arenas of Presidential power into which courts historically have been wary of encroaching.

Petitioner agrees that *United States v. Bush*, 310 U.S. 371 (1940), *Dakota Central Telephone Co. v. State of South Dakota*, 250 U.S. 163 (1919) and *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), are distinguishable from the opinion below, because in each of those cases "special reasons existed for concluding that judicial review was precluded." *Chamber of Commerce*, 74 F.3d at 1332 n.5. That distinction illustrates the need to grant certiorari here, because the "special reasons" that deny judicial review of Presidential action are narrow, historically accepted grounds of discretionary decisions about national security and foreign relations, neither being present here.

II.

THE PRESIDENT'S DECISION UNDER SECTION 421 CONTRAVENED THE EXPLICIT LIMITATIONS THEREOF AND IS THEREFORE SUBJECT TO REVIEW BY THE COURTS

The President's determination under Section 421(k)(2) does not constitute an exercise of broad Presidential discretion. If anything, it was an arbitrary act unjustified by law. Under Section 421(k)(2), the President must make specific findings of economic fact pursuant to a limited grant to him by Congress of its constitutional power. Specifically, the President's findings under Section 421(k)(2) must be supported by facts of record and the statute affords him no discretion in regard to the grounds upon which he can make his decision. The mere incantation of the statutory elements in an administrative order does not substitute for a factual record from which an administrative decision can be made, or suffice for a decision within the parameters set by the statute.

Petitioner does not ask this Court to "flyspeck" the President's exercise of discretion. To begin with, the Court of Appeals made no effort to review the merits of the case and this Court must set the standard for judicial review before the merits can be reached. Secondly, the President failed even to create an administrative record against which his findings can be tested.

Courts are obligated to determine the exact nature of the President's powers and the limitations thereon by examining the statutory language and legislative history of the delegating statute, and by comparing the statutory grant with similar statutes previously interpreted by the courts. Here, neither the Court of International Trade nor Federal Circuit performed such basic analysis of the President's function under Section 421.

Respondents' position is that the President may "comply" with Section 421 by merely parroting in conclusory fashion the language of the statute. However, if such Presidential "findings" are not subject to review by the courts, then the limitations prescribed by Congress on delegated Presidential authority are rendered meaningless and the Executive Branch is checked only by justifications of its choosing. In fact, the D.C. Circuit expressed this very concern in *Chamber of Commerce*: "In sum, we think it untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting pursuant to [the authorizing statute]." 74 F.3d at 1332.

Respondents' argument that *Dalton* establishes a sufficient distinction "between claims of constitutional violations and claims that an official has acted in excess of his statutory authority" *Dalton*, 511 U.S. at 472, such that the propriety of the latter cannot be judicially reviewed on

the record, *see* Opp. 12, makes no sense. Underscoring the point, respondents fail to proffer any explanation of the purported distinction between the reviewability of *ultra vires* and unconstitutional Presidential actions.

Conversely, petitioner submits that the President acted *without* statutory authority precisely *because* he failed to make the required findings of fact on the record required by the statute, substituting mere conclusions for the requisite factual findings. If certain Presidential actions contravene the limitations of an authorizing statute, then the President necessarily performs those acts *without* statutory authority. Such actions are unconstitutional and are subject to judicial review.

Petitioner has never had the opportunity to demonstrate that the President's findings in this case are unsupported despite the statutory requirements to the contrary, because the courts have refused even to examine whether the President's findings are supported by the record. It is disingenuous to assert that, upon a decision by this Court that judicial review exists, respondents cannot prevail. Indeed, Justice Gajarsa stated that the "majority's assertion that Motion Systems fails to state a colorable claim of ultra vires action is dubious." *Motion Systems*, 437 F.3d at 1364 (Gajarsa, J., concurring in part and con rring in the judgment).

The respondents argue that certiorari should not be granted because, in their view, petitioner will not prevail on the merits even if this Court holds that judicial review may be had. That argument likewise lacks merit. Indeed, this case concerns the Presidential finding that economic grounds (a purported increase in price of the downstream product) dictated that America's elderly be provided with non-American mobility scooters priced contrary to law,

because of their quality and low cost, when no part of the administrative record established those propositions. In fact, the factual record directly contradicts this.

For example, Comment No. 29 before the United States Trade Representative (USTR) quotes the sworn testimony of George Flowers, an officer of Electric Mobility Corporation (EMC), in federal court on December 17, 2002 that EMC had "[a]bsolutely not" reduced its prices because of savings on the cheaper Chinese imports. (*See* Comment No. 29 to USTR, via letter dated December 23, 2002, at 2). Yet, the President, citing the "cost of the quota to consumers" and the attendant negative impact upon "the many disabled and elderly purchasers of mobility scooters", denied the requested import relief on the ground that such relief "was not in the national economic interest of the United States." Presidential Determination, 68 Fed. Reg. 3157-58.

Uncontradicted Veterans Affairs pricelists submitted by petitioner to the USTR demonstrated that EMC had *not* lowered its prices on mobility scooters as a result of using the Chinese pedestal actuators. (Complaint, Ex. 2, Attachments 1(a) and 1(b).) (CAFC JA 83-98.) Notwithstanding such evidence, the USTR, in a letter dated March 7, 2003, denied petitioner's request for reconsideration of the President's findings. (Complaint, Ex. 3.) (CAFC JA 154-55.) Further, it is indisputable the FDA has recalled the imported devices due to their shoddy construction and health risks (*see* FDA Recall Number Z-0903-06), defects that were brought to the attention of the USTR, and presumably the President, in Comment No. 29 before the USTR. (*See* Comment No. 29 to USTR, via letter dated December 23, 2002, at 2-3.)

In sum, the challenged Presidential findings are unsupported by and/or contrary to the factual record and thus,

at a minimum, petitioner raises valid claims that the President acted beyond his delegated authority under Section 421(k)(2). Petitioner is therefore entitled to judicial review of its claim of *ultra vires* Presidential action.

CONCLUSION

For the reasons set forth above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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